

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 08-13555

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In the Matter of:

LEHMAN BROTHERS HOLDINGS, INC., et al.

Debtors.

- - - - -x

United States Bankruptcy Court

One Bowling Green

New York, New York

November 5, 2008

10:02 AM

B E F O R E:

HON. JAMES M. PECK

U.S. BANKRUPTCY JUDGE

1  
2 HEARING re Debtors' Motion Pursuant to Sections 105(a) and 331  
3 of the Bankruptcy Code and Bankruptcy Rule 2016(a) for  
4 Authorization to Establish Procedures for Interim Monthly  
5 Compensation and Reimbursement of Expenses of Professionals  
6

7 HEARING re Debtors' Motion Pursuant to Sections 105(a), 327,  
8 328, and 330 of the Bankruptcy Code for Authorization to Employ  
9 Professionals Utilized in the Ordinary Course of Business Nunc  
10 Pro Tunc to the Commencement Date  
11

12 HEARING re Application of the Debtor and Debtor in Possession  
13 Lehman Brothers Holdings, Inc. Pursuant to Sections 327(e) and  
14 328(a) of the Bankruptcy Code for Authorization to Employ, Nunc  
15 Pro Tunc, Mckee Nelson LLP as Special Tax Counsel  
16

17 HEARING re Application to Employ Milbank, Tweed, Hadley &  
18 McCloy LLP as Counsel to Official Committee of Unsecured  
19 Creditors / Application Of Official Committee Of Unsecured  
20 Creditors Of Lehman Brothers Holdings Inc., et al., Under 11  
21 U.S.C. Section 1103 And Fed. R. Bankr. P. 2014 And 5002, For  
22 Order Authorizing Retention And Employment Of Milbank, Tweed,  
23 Hadley & McCloy LLP As Counsel, Effective As Of September 17,  
24 2008  
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HEARING re Application to Employ Quinn Emanuel Urquhart Oliver  
& Hedges, LLP as Special Counsel to Official Committee of  
Unsecured Creditors Application of Official Committee Of  
Unsecured Creditors of Lehman Brothers Holdings Inc., et al.,  
Under 11 U.S.C. Sections 328 and 1103 and Fed. R. Bankr. P.  
2014 and 5002, for Order Authorizing Retention and Employment  
of Quinn Emanuel Urquhart Oliver & Hedges, LLP, as Special  
Counsel, Nunc Pro Tunc to September 17, 2008

HEARING re Application to Employ FTI Consulting Inc. as  
Financial Advisor to Official Committee Of Unsecured  
Creditors/Application Of Official Committee Of Unsecured  
Creditors Of Lehman Brothers Holdings Inc., et al., For Order  
Under 11 U.S.C. Sections 328(a) And 1103, Fed. R. Bankr. P.  
2014, And S.D.N.Y. LBR 2014-1, Authorizing Employment And  
Retention Of FTI Consulting Inc., As Its Financial Advisor As  
Of September 17, 2008

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2 HEARING re Application to Employ Houlihan Lokey Howard & Zukin  
3 Capital, Inc. as Investment Banker to Official Committee Of  
4 Unsecured Creditors / Application Of Official Committee Of  
5 Unsecured Creditors For Order Under 11 U.S.C. Sections 328(a)  
6 And 1103, Fed. R. Bankr. P. 2014, And S.D.N.Y. LBR 2014-1,  
7 Authorizing Employment And Retention Of Houlihan Lokey Howard &  
8 Zukin Capital, Inc. As Investment Banker As Of September 17,  
9 2008

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11 HEARING re Motion of The Vanguard Group, Inc. for Entry of An  
12 Order Approving Specified Information Blocking Procedures and  
13 Permitting Trading of Claims Against the Debtor Upon  
14 Establishment of A Screening Wall

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16 HEARING re Debtors Motion Pursuant to Sections 105(a), 362(d),  
17 363(b) and 503(b) of the Bankruptcy Code and Bankruptcy Rules  
18 4001, 6003 and 6004 Seeking Authority to (A) (i) Continue the  
19 Debtors Workers Compensation Programs and its Liability,  
20 Property, and Other Insurance Programs and (ii) Pay All Pre-  
21 petition Obligations in Respect Thereof and (B) Schedule a  
22 Final Hearing

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2 HEARING re Motion of Cargill Investment Group, Ltd. for Relief  
3 from Stay to Terminate Management Agreement and for Allowance  
4 and Payment of Administrative Expense Claim

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6 HEARING re Debtors Motion Pursuant to Section 365 of the  
7 Bankruptcy Code and Bankruptcy Rules 6006 and 9014 for  
8 Authorization to Reject Contingent Management Agreement with  
9 WestLB AG

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11 HEARING re Debtors Motion Pursuant to Sections 105(a) and 362  
12 of the Bankruptcy Code for an Order Approving Restrictions on  
13 Certain Transfers of Interests in the Debtors and Establishing  
14 Notification Procedures Relating Thereto

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16 HEARING re Debtors Motion for Entry of an Order Pursuant to  
17 Section 363 of the Bankruptcy Code and Federal Rule of  
18 Bankruptcy Procedure 6004 Authorizing Lehman Brothers Holdings  
19 Inc. to Enter into a Sale and Purchase Agreement of G-IV  
20 Aircraft

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2 HEARING re Motion of DNB NOR BANK ASA for Entry of (I) an Order  
3 Pursuant to 11 U.S.C. Section 362(d) and Fed.R.BankR.P.4001  
4 Granting Relief From the Automatic Stay to Effect Setoff or, in  
5 the Alternative, (II) an Order Pursuant to 11 U.S.C. Section  
6 361 and 506(a) Requiring the Debtors to Provide Adequate  
7 Protection

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9 HEARING re Debtors Motion Pursuant to Sections 105(a), 345(b),  
10 363(b), 363(c) and 364(a) of the Bankruptcy Code and Bankruptcy  
11 Rules 6003 and 6004 (A) for Authorization to (i) Continue Using  
12 Existing Centralized Cash Management System, as Modified, (ii)  
13 Honor Certain Pre-petition Obligations Related to the Use of  
14 the Cash Management System, and (iii) Maintain Existing Bank  
15 Accounts and Business Forms; (B) for an Extension of Time to  
16 Comply with Section 345(b) of the Bankruptcy Code, and (c) to  
17 Schedule a Final Hearing

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19 HEARING re Motion of Sumitomo Mitsui Banking Corporation for  
20 Relief from the Automatic Stay to Foreclosure on its Collateral  
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HEARING re Motion to Reconsider FRCP 60 or FRBP 3008 / Motion  
for Clarification, and Relief from Judgment pursuant to Fed R.  
Civ. P. 60(b), Section 105(a) of the Bankruptcy Code, regarding  
the Courts Order Approving the Sale of Assets to Barclays  
Capital Inc. with respect to Non-Debtor Assets (related  
document(s)[258])

HEARING re Motion of Evergreen Solar, Inc. for Preliminary  
Injunction

HEARING re Trustee's Application for Entry of an Order  
Regarding Disinterestedness of the Trustee and Counsel to the  
Trustee

HEARING re Cargill Investment Group, Ltd.'s Motion for Relief  
from Automatic Stay

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2 HEARING re Motion to Authorize Trustees Motion to (A) Adopt and  
3 Incorporate by Reference for Purposes of this Proceeding, an  
4 Order Authorizing (I) Continuing Use of Existing Centralized  
5 Cash Management System, as Modified; (II) Honoring Certain Pre-  
6 petition Obligations Related to the Use of the Cash Management  
7 System; (III) Maintaining Existing Bank Accounts and Business  
8 Forms; and (IV) Extending Time to Comply with Section 345(b) of  
9 the Bankruptcy Code, and (B) Authorize, but not Direct, Payment  
10 of Certain Pre-petition Compensation and Employee Benefit  
11 Obligations

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13 HEARING re Motion to Authorize Motion for Order Pursuant to  
14 Section 78eee(b)(5) of SIPA, Sections 105, 330 and 331 of the  
15 Bankruptcy Code, Bankruptcy Rule 2016(a) and Local Bankruptcy  
16 Rule 2016-1 Establishing Procedures Governing Interim Monthly  
17 Compensation of Trustee and Hughes Hubbard & Reed LLP

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19 HEARING re Motion to Set Last Day to File Proofs of Claim  
20 Trustees Application for Entry of an Order Approving Form and  
21 Manner of Publication and Mailing of Notice of Commencement;  
22 Specifying Procedures and Forms for Filing, Determination, and  
23 Adjudication of Claims; Fixing a Meeting of Customers and Other  
24 Creditors; and Fixing Interim Reporting Pursuant to SIPA  
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HEARING re Motion to Authorize Trustees Application Pursuant to  
Section 105(a) of the Bankruptcy Code and Bankruptcy Rules  
1015(c) and 9007 Seeking Authority to Implement Certain Notice  
and Case Management Procedures and Related Relief

HEARING re Motion to Reject Lease or Executory Contract  
Trustees Motion for Entry of an Order Approving the Rejection  
of Certain Nonresidential Real Property Leases and Subleases  
and Abandonment of Related Personal Property

HEARING Motion to Extend Time Trustees Application for an Order  
Pursuant to Section 365(d)(1) of the Bankruptcy Code Extending  
Time Within Which the Trustee May Assume or Reject Executory  
Contracts and Certain Unexpired Leases

Transcribed by: Lisa Bar-Leib

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1 P R O C E E D I N G S

2 THE COURT: Please be seated. Mr. Miller, good  
3 morning.

4 MR. MILLER: Good morning, Your Honor. Harvey  
5 Miller, Weil Gotshal & Manges, on behalf of the debtors. I  
6 believe, Your Honor, that this is the third omnibus hearing in  
7 these Chapter 11 cases, the last hearing having been on October  
8 16th. And before turning to the calendar, Your Honor, I just  
9 thought I'd give you a slight update on what we have been doing  
10 since October 16th.

11 THE COURT: I'd be interested in hearing that.

12 MR. MILLER: Yeah. It's been a very busy period,  
13 Your Honor. And as each day has gone by, it has resulted in  
14 greater organization and greater control of the assets and  
15 liabilities of these estates. The chief restructuring officer  
16 has been filling in the teams that are working on this matter.  
17 And every team has been filled in, Your Honor, except for  
18 filling in the team that is working on the derivatives. And  
19 that's a more selective expertise and a little bit harder to  
20 find the employees for that. But that's in process.

21 Mr. Marsal and the debtors, Your Honor, have taken  
22 very seriously Your Honor's admonition about transparency.  
23 There have been sequential meetings with various groups of  
24 creditors over the last three weeks. And, as Your Honor will  
25 notice from looking at the agenda, the Rule 2004 motions, to a

1 large extent, have been deferred. Harbinger, which was the  
2 lead moving party, has agreed to adjourn that sine die to be  
3 restored on -- I think, it's twelve days' notice or fourteen  
4 days' notice, Your Honor. And maybe of the other Rule 2004  
5 applicants or movants have likewise agreed to that. The few  
6 that haven't and there are about seven who have and have agreed  
7 to adjourn it to November 18th as we try to get more  
8 information out.

9 And the problem with getting all this information  
10 out, Your Honor, is some of the information, we are finding  
11 out, people are seeking information to -- taking advantage in a  
12 way in trading in claims for and against the Lehman Brothers'  
13 estate. So we're very careful about information going out.  
14 And there are confidentiality agreements and these are 408  
15 meetings. But in the context of more transparency, Your Honor,  
16 we are trying very hard to post to a website -- we're having a  
17 little difficulty; we thought it was going to be done on  
18 Monday -- a presentation that has been made to Harbinger and  
19 other creditors which will be available to all creditors. In  
20 addition, we are posting a contact list for Lehman Brothers so  
21 that if a creditor or a claimant has a particular kind of claim  
22 and wants to speak to somebody at Alvarez & Marsal, there will  
23 be a contact list with e-mail addresses and phone numbers. So,  
24 each day, we're improving the contacts and the transparency.

25 In addition to that, Your Honor, we are engaged --

1 the CRO is engaged with his team in negotiating protocols with  
2 the various foreign fiduciaries which include the joint  
3 administrators for Lehman Brothers Inc. Europe and for the  
4 Asian domain. And those are in the process right now. And we  
5 hope that we'll reach maturity before the next date.

6 So there's been a lot of activity going on and effort  
7 made, Your Honor, to avoid protracted Court hearings wherever  
8 possible.

9 With that and with Your Honor's permission, I would  
10 turn to the agenda. And I would go through the uncontested  
11 matters with Your Honor and the adjournments and then we can go  
12 to the contested matters, if that's all right with Your Honor.

13 THE COURT: That's fine. I just have one question  
14 about the 2004 discovery. You indicated that, to a large  
15 extent, those matters have been adjourned. I didn't see any  
16 active matters relating to 2004 discovery on the agenda. Have  
17 they all been put off?

18 MR. MILLER: All put off, Your Honor. Either --

19 THE COURT: Okay.

20 MR. MILLER: Without date, Your Honor, subject to  
21 restoration, or to November 18th.

22 THE COURT: Fine. And the website that --

23 MR. MILLER: And there will be stipulations, Your  
24 Honor, that we will be handing up.

25 THE COURT: And the website that you mentioned?



1 MR. MILLER: Yes.

2 THE COURT: Is that a separate website or is that  
3 linked to an existing website?

4 MR. MILLER: That's where the problem has occurred,  
5 Your Honor. The old Lehman website is really owned by Barclays  
6 now. So we are setting up a website, as I understand it,  
7 through EPIQ, the claims administrator. So people will be able  
8 to go through the claims website and get to this website.

9 THE COURT: All right.

10 MR. MILLER: Okay? So, if Your Honor please, I would  
11 go to the uncontested matters. The first matter on the  
12 calendar, Your Honor, is the motion to establish procedures for  
13 interim compensation and reimbursement of expenses. This is a  
14 pretty standard order, Your Honor. It has been reviewed with  
15 the U.S. trustee and there were changes made to the order to  
16 accommodate the comments of the U.S. trustee. And there are no  
17 objections to the order, Your Honor.

18 THE COURT: Matters of this sort are routine, at  
19 least in the Southern District of New York, and I'm prepared to  
20 approve it.

21 MR. MILLER: Thank you, Your Honor. The second  
22 matter, Your Honor, is authorization to retain, nunc pro tunc  
23 to the commencement date, ordinary course professionals. Once  
24 again, Your Honor, this motion and the order have been reviewed  
25 with the Office of the United States Trustee. It has been

1 conformed to the comments of the United States trustee. And  
2 there are no objections to this order, Your Honor.

3 THE COURT: That is approved.

4 MR. MILLER: The third matter on the calendar, Your  
5 Honor, is the application of the debtors to employ, nunc pro  
6 tunc, McKee Nelson LLP as special tax counsel. The McKee  
7 Nelson firm, Your Honor, has historically been the tax counsel  
8 for Lehman Brothers. And there are many, many complicated tax  
9 issues that relate to these Chapter 11 cases, Your Honor.

10 THE COURT: Does the Office of the United States  
11 Trustee have any comment with respect to this?

12 MR. VELEZ-RIVERA: Andrew Velez-Rivera for the United  
13 States trustee. We've seen a revised form of order, Your  
14 Honor, that reflects our comments and we have no objection on  
15 that basis.

16 THE COURT: Fine. It's approved.

17 MR. MILLER: Your Honor, items 4 through 8 relate --  
18 I'm sorry. 4 through 7 relate to the creditors' committee and  
19 engagement of its professionals. I'll turn that over to Mr.  
20 Dunne, Your Honor.

21 MR. DUNNE: Good morning, Your Honor. For the  
22 record --

23 THE COURT: Good morning, Mr. Dunne.

24 MR. DUNNE: -- Dennis Dunne from Milbank Tweed Hadley  
25 & McCloy on behalf of the official creditors' committee. And

1 my comments do apply to the next four agenda items. We are  
2 seeking only interim approval of these retention applications,  
3 not final approval. At the U.S. trustee's request, we have  
4 adjourned consideration of the final order until November 18th  
5 and have extended the deadline to object solely with respect to  
6 the Office of the United States Trustee and the debtors until  
7 November 13th.

8 THE COURT: I've looked at these. I don't have any  
9 issues. And particularly, since this is all happening on an  
10 interim rather than a final basis, I'm prepared to approve  
11 them. But I'll hear what the U.S. trustee has to say.

12 MR. VELEZ-RIVERA: Your Honor, the Office of the  
13 United States Trustee has been engaged in a series of ongoing  
14 discussions with all of the professionals including the  
15 professionals for the creditors' committee. Several of our  
16 concerns, and there have been literally dozens of them, have  
17 been resolved. But we still have a way to go, particularly,  
18 with respect to substantive issues involving both disclosure  
19 and what would be broadly characterized as concurrent  
20 representations. Both the professionals in my office are still  
21 working through those. We will address them on November the  
22 18th. We have no objection in the meantime to the entry of an  
23 interim order.

24 THE COURT: It sounds like a reservation of rights  
25 with lumps in it. I think I understand what you're talking

1 about although I'm not sure what you meant by the areas of  
2 concurrent representation.

3 MR. VELEZ-RIVERA: Your Honor, to say the least, in  
4 light of the magnitude of the case and the number of  
5 professionals involved, every single professional whose  
6 employment application we have seen has what could be called  
7 "connections". And some of those connections are not -- they  
8 range from the not problematic to the very problematic.  
9 Accommodating ourselves along that continuum is what we're  
10 wrestling with at the moment.

11 THE COURT: I understand. We'll deal with it at the  
12 next omnibus hearing on the 18th. Meanwhile, on an interim  
13 basis, each one of these applications is approved.

14 MR. MILLER: Thank you, Your Honor.

15 MR. DUNNE: Thanks, Judge.

16 MR. MILLER: Your Honor, number 8 on the agenda is  
17 the motion of Vanguard Group for, basically, a screening wall  
18 to allow trading within the organization. Vanguard is a new  
19 member of the creditors' committee, Your Honor. Your Honor has  
20 previously approved the same type of order. There are no  
21 objections to this order so --

22 THE COURT: And Vanguard's counsel is here to stand  
23 in your spot and say that he wants this relief and for me to  
24 grant it.

25 MR. ANGELICH: Thank you, Your Honor, yes. George

1 Angelich of Arent Fox, counsel to Vanguard Group. We'd request  
2 that the relief be granted.

3 THE COURT: It's consistent with relief I've granted  
4 to other committee members who've sought similar protection to  
5 allow trading. And I'm prepared to approve this.

6 MR. ANGELICH: Thank you, Your Honor.

7 MR. MILLER: Number 9 on the agenda, Your Honor, is  
8 the debtors' motion to continue workman's compensation programs  
9 and its liability, property and other insurance programs and to  
10 authorization the payment of all pre-petition obligations in  
11 relation to workman's compensation, Your Honor. There are no  
12 objections and I would ask Your Honor to approve the  
13 application and enter the order.

14 THE COURT: It's approved.

15 MR. MILLER: The next matter, Your Honor, is the  
16 motion by Cargill Group Ltd. We have reached a stipulation,  
17 Your Honor, but I'll allow counsel to take the podium if he  
18 wants to. Okay. I'm told, Your Honor, that counsel is relying  
19 upon us to present the stip.

20 THE COURT: Okay. So why don't you present the  
21 stipulation.

22 MR. MILLER: So we will present the stip, Your Honor.

23 THE COURT: Is that going to happen now or later in  
24 the hearing?

25 MR. MILLER: Do we have the stip?

1 MR. LUCAS: Your Honor, this is John Lucas on behalf  
2 of Lehman. But Cargill, Lehman and the LBI trustee have all  
3 agreed to lift the automatic stay for the limited purpose of  
4 permitting Cargill to terminate its management agreement with  
5 LBI. In exchange, Cargill has agreed that it does not have a  
6 claim arising from the termination of the management agreement  
7 either pre or post-petition against the debtors and that all  
8 rights to claims between LBI and Cargill have been reserved.

9 THE COURT: That sounds like the stipulation. Is it  
10 something which involves the writing to be so ordered or is  
11 that simply a statement being read into the record for me to so  
12 order? Or is that simply a statement of the intention of the  
13 parties?

14 MR. LUCAS: It's a stipulation agreement and proposed  
15 order that we will submit to Your Honor after the hearing.

16 THE COURT: Fine. So I'll treat that as simply a  
17 statement of what will later be coming to be so ordered. And I  
18 take it that there are no objections to that arrangement.  
19 Hearing none, I will simply approve that in the ordinary course  
20 once it's received.

21 MR. MILLER: Thank you, Your Honor. Item number 11,  
22 Your Honor, is the debtors' motion to reject a contingent  
23 management agreement with WestLB AG. This is an agreement  
24 which provides for WestLB to assume certain management  
25 functions that were previously performed by a subsidiary of the

1 debtors, Your Honor. We have reached an agreement and a  
2 stipulation will be presented to the Court, Your Honor,  
3 essentially allowing for the rejection. There is a reservation  
4 of rights on the part of WestLB to present a claim for  
5 rejection damages. And we have no objection to that, Your  
6 Honor. I don't know if WestLB is here.

7 THE COURT: Are you counsel for WestLB?

8 MR. HAWKINS: Yes, Your Honor. Howard Hawkins from  
9 Cadwalader for WestLB and what Mr. Miller said is correct.

10 THE COURT: Fine.

11 MR. MILLER: Thank you, Your Honor. Item number 12,  
12 Your Honor, is the debtors' motion which I will refer to Your  
13 Honor as an NOL order. It's to preserve the net operating  
14 losses carried forward. It is spelled out in the application,  
15 Your Honor. There have been no objections to it. It's an  
16 attempt, really, to preserve the NOL going forward to the  
17 extent it has value.

18 THE COURT: Let me simply confirm that there are no  
19 objections to the entry of this order. In other cases, I know  
20 that these motions have led to at least some objections or  
21 requests for clarification. And I am prepared to approve this  
22 with the understanding that there are no objections to the  
23 requested relief.

24 MR. MILLER: There were some changes made to the  
25 order, Your Honor, which everybody agreed to.

1 THE COURT: And those changes are the result of --  
2 from parties potentially to be affected by the order?

3 MR. MILLER: Ms. Berkovich, Your Honor, will explain  
4 it.

5 MS. BERKOVICH: Your Honor, Ronit Berkovich, Weil  
6 Gotshal. The transfer agent for the common stock, which is  
7 Bank of New York Mellon, asked us to make some changes to the  
8 order to add language that says that we will pay their fees for  
9 effecting service of the notice onto the record holders and  
10 also that they will not incur liability as a result of another  
11 party violating this order. We made those changes to the order  
12 and we have a blackline that we can give to Your Honor, if  
13 you'd like.

14 THE COURT: All right. I'll take a look at the  
15 changes but I see no problem with what you've said.

16 MR. MILLER: Thank you, Your Honor. The next item on  
17 the agenda, Your Honor, is the debtors' application for  
18 approval of the sale of a G-IV airplane. The revised  
19 application, Your Honor, provides for a sale in the amount of  
20 24.9 million dollars which, unfortunately, in the economic  
21 circumstances, that's a slight reduction from the original  
22 price. The order has been revised to meet the comments of both  
23 the United States attorney and the U.S. trustee's office. And  
24 there are no objections other than that, Your Honor.

25 THE COURT: That sale is approved.



1 MR. MILLER: Thank you, Your Honor. Item 14, Your  
2 Honor, is the motion to compel Lehman Commercial Paper Inc. to  
3 assume or reject executory contracts. I don't know if  
4 counsel's present. We have reached an agreement, Your Honor,  
5 which is being encompassed in a stipulation. Basically, the  
6 motion is being granted. There's a reservation to, I  
7 understand, fifty executory contracts which we needed some more  
8 factual information on, Your Honor. But other than that, the  
9 debtors have no objection to the motion and we'll submit an  
10 order.

11 THE COURT: All right. I saw on the ECF system  
12 yesterday a form of stipulation to resolve this motion although  
13 as I read it, it included the provision that various things  
14 have to happen between now and I think the 18th.

15 MR. MILLER: Ms. Marcus, Your Honor, from Weil  
16 Gotshal, will respond.

17 MS. MARCUS: Good morning, Your Honor. Jacqueline  
18 Marcus, Weil Gotshal & Manges, on behalf of Lehman Brothers.  
19 Your Honor, on Friday, October 31st, we did file a notice of  
20 presentment of a stipulation resolving this matter. And  
21 yesterday, the debtors determined that of the 11 to 1200 open  
22 trades that were out there, there were forty-nine exactly as to  
23 which they believed that they need more time because there are  
24 some difficult inter-Lehman issues as well as issues that  
25 involve some structured vehicles. So the debtors decided in

1 their business judgment that it made more sense to take a  
2 little more time on those. So what we have prepared is a  
3 revised stipulation which says that the notification deadline  
4 remains November 7th except for certain trades that are listed  
5 on an exhibit. Those are the forty-nine trades. And that we  
6 will file a motion to assume or reject all the other ones by  
7 November 16th. As to the forty-nine trades, we've asked for  
8 an -- we provided for an additional, essentially, four weeks to  
9 provide the notification on those. And those will be handled  
10 with a subsequent motion to assume or reject. And the moving  
11 parties represented by Mr. Friedman have agreed to that. In  
12 addition, there were two joinder parties who had joined in the  
13 original motion and they're okay with the revised language.  
14 The creditors' committee, in addition, is also in approval of  
15 the revised language.

16 THE COURT: Now, as to the forty-nine trades that are  
17 in the zone of requiring additional time to study them so that  
18 you can make the decision whether to assume or reject, is there  
19 a lawyer present in the room who represents those  
20 counterparties? Are they represented by either of the lawyers  
21 now standing before me?

22 MS. MARCUS: I don't believe that they're represented  
23 by either of the lawyers standing before you or anyone else who  
24 has either objected or joined in the original motion to compel.

25 THE COURT: Okay. So you're taking the position that

1 as to these forty-nine, they're not covered by the original  
2 motion anyway so you can effectively take what time you need  
3 and you've laid out the four week window for yourselves.

4 MS. MARCUS: That's correct, Your Honor. There was  
5 an -- the original motion and the debtors determined because,  
6 frankly, of a lot of market pressure as well as the debtors'  
7 own business justifications that it made sense to do this on an  
8 across the board basis except for these fifty. And I'm happy  
9 to hand up the blacklined version of the stipulation if you'd  
10 like to see it now. Or we can submit it later.

11 THE COURT: Why don't you hand that up? And I'll  
12 also hear from counsel who appear to want to say a few words.  
13 Well, maybe not. Maybe he's just --

14 MR. FRIEDMAN: No. Your Honor.

15 THE COURT: Just wanted a better view.

16 MR. FRIEDMAN: If you have any questions, Your Honor,  
17 I'm here. Otherwise, Michael Friedman, Richards, Kibbe & Orbe  
18 on behalf of the movants. We are fine with the revised order.

19 THE COURT: And that's true for you, too?

20 MS. KALOUDIS: Yes. Denise Kaloudis of Skadden,  
21 Arps, Slate, Meagher & Flom on behalf of BlackRock Financial  
22 Management. We also filed a joinder and as debtors' counsel  
23 accurately presented, we reviewed the stipulation and agree  
24 with the proposed mechanism set forth therein.

25 MR. BRYAN: Good morning, Your Honor. David Bryan,

1 Wachtell, Lipton, Rosen & Katz, on behalf of JPMorgan. We also  
2 filed a joinder and we're also pleased to be covered by the  
3 stay.

4 THE COURT: Fine.

5 MS. MARCUS: May I approach?

6 THE COURT: You may approach. Thank you. Seems to  
7 be an appropriate way to resolve the problem. And I'm  
8 approving the stipulation.

9 MS. MARCUS: Thank you, Your Honor.

10 MR. MILLER: With Your Honor's permission, I would  
11 move to the adjourned matters and just run through those  
12 quickly with Your Honor. And then we can come back to the  
13 contested matters.

14 THE COURT: Okay. So we would move, Your Honor, to  
15 item 28. 28, 29, 30 are applications for employment of the  
16 debtors' professionals, Your Honor. All of those matters are  
17 going over to November 18th with the continuing discussions  
18 with the Office of the United States Trustee.

19 Item 31, which is the order -- the committee's  
20 order -- motion, I should say, Your Honor, in relation to the  
21 debtor-in-possession financing. We've been holding that  
22 because we haven't finally included all the issues with the  
23 debtor-in-possession financing, which, as Your Honor knows, is  
24 not outstanding. It has been paid in full, we think, anyway.  
25 So that's going over, Your Honor, to November 18th.

1 32, Your Honor, WFP Tower A Co. L.P.'s motion for  
2 payment of post-petition administrative expense, the parties  
3 have agreed to put that over to November 18th. 33, Meridian  
4 Company of New York's motion for an order compelling payment of  
5 post-petition administrative expenses likewise is going over to  
6 the 18th, Your Honor. What we're doing on these is trying to  
7 get the facts and see if they can be resolved.

8 As I said before, Your Honor, number 34 is the  
9 Harbinger motion for Rule 2004 authority to conduct  
10 investigations. That has been adjourned sine die subject to  
11 restoration. Of the 2004 joinders, Your Honor, there were  
12 twelve joinders to the Harbinger motion. Nine of them have  
13 agreed to adjourn sine die. Six or seven, Your Honor, have  
14 been adjourned to November 18th because we're in sequential  
15 meetings. I'm sure when they get to the website and they see  
16 this presentation and the -- Rule 2004 examinations that are  
17 sought, Your Honor, in connection with the particular count and  
18 getting information on the particular count has been difficult  
19 because the system hasn't been working the way it worked  
20 before. We are now getting some access to more information and  
21 we are replying to specific customer account inquiries. And  
22 the contact list will alleviate some of the administrative  
23 processes. Now they'll be able to go directly to a person at  
24 Alvarez & Marsal who will take the information and seek to get  
25 the information as to a particular account. So all of the

1 2004s, Your Honor, are either over to November 18th or  
2 adjourned sine die. And we'll be filing stipulations with the  
3 Court.

4 THE COURT: Fine.

5 MR. MILLER: The motion of the creditors' committee's  
6 conflicts counsel, Your Honor, to conduct discovery of JPMorgan  
7 Chase -- and if I can expedite it, Your Honor, a stipulation  
8 will be presented to Your Honor pursuant to which there is an  
9 agreement between Quinn Emanuel and JPMorgan Chase which will  
10 provide for the commencement of discovery, let me put it that  
11 way, and an adjournment of this matter for ninety days, Your  
12 Honor. So that stipulation will be presented at the end of  
13 this hearing.

14 THE COURT: So the discovery to be conducted will be  
15 consensual and rights are being reserved?

16 MR. MILLER: Reserved, Your Honor.

17 THE COURT: Okay.

18 MR. MILLER: And whatever is produced in connection  
19 with that discovery by Quinn Emanuel -- the same product, let  
20 me call it, will be furnished to the debtors also as part of  
21 the stipulation.

22 THE COURT: Okay. Is there someone from Quinn  
23 Emanuel who wants to speak to this?

24 MR. TECCE: Good morning, Your Honor. James Tecce of  
25 Quinn Emanuel on behalf of the official committee of unsecured

1 creditors. Mr. Miller described the stipulation. There are, I  
2 believe, just two other features of the stipulation which I can  
3 speak to. The first is that we'll enter into a form of  
4 confidentiality agreement that's acceptable to Chase and the  
5 debtors. Secondly, Chase's rights are reserved in the event  
6 that an examiner is appointed in the case to examine Chase and  
7 Lehman Brothers transactions. They reserve their right to seek  
8 relief from their obligations under the stipulation. They'll  
9 agree to produce a privilege log. And I believe that that --  
10 the final feature is that attached to the stipulation is a very  
11 short chart that shows which documents Chase has agreed to  
12 produce now. But the balance of the motion will be pushed  
13 forward for ninety days, meaning the balance of the document  
14 request. And with that, we would respectfully request the  
15 ability to submit the stipulation at the end of the hearing for  
16 signature.

17 MR. BRYAN: Good morning, Your Honor. David Bryan  
18 from Wachtell, Lipton for JPMorgan Chase. That accurately  
19 reflects the stipulation. We signed it yesterday; it's ready  
20 to go.

21 THE COURT: Fine. Okay.

22 MR. MILLER: The next matter, Your Honor, is item  
23 number 36, which is the motion of Barclays Capital for relief  
24 concerning certain contracts erroneously posted with the  
25 closing date contracts. That likewise, Your Honor, is going

1 over to November 18th. I don't know if Barclays wants to say  
2 anything. No?

3 The next item, Your Honor, is another motion by  
4 Barclays for relief concerning an American Express contract  
5 that was erroneously posted with the closing date contracts.  
6 That, likewise, is going to November 18, Your Honor.

7 Then there's -- number 38, Your Honor, is the motion  
8 of the Walt Disney Company for the appointment of an examiner  
9 pursuant to Section 1104(c)(2) of the Bankruptcy Code. We have  
10 been in discussions, Your Honor, with the Walt Disney Company's  
11 attorneys and they've agreed to put it over to November 18th.  
12 We hope to reach some amicable conclusion of that matter.

13 The next item, Your Honor, relates to the motion of  
14 Barclays and the debtors to file under seal certain schedules.  
15 There have been discussions about that motion, Your Honor, and  
16 the parties have all agreed to put it over without date. I  
17 think progress is being made, Your Honor.

18 THE COURT: That's good.

19 MR. MILLER: Number 40, Your Honor, is the motion --  
20 this is the one motion -- I'm sorry. This is the Federal Home  
21 Loan Mortgage Corporation which I think is the successor to  
22 Freddie Mac off the other entity. And they have agreed to put  
23 it over to November 18th.

24 The last adjournment item, Your Honor, is item 41, a  
25 motion for relief from the automatic stay to proceed with class



1 action settlements of a certified class action entitled  
2 "Austin, et al, v. Chisick". The parties have agreed to put  
3 that over for November 18th, Your Honor.

4 THE COURT: There's also a number on there carried --

5 MR. MILLER: I'm sorry?

6 THE COURT: Number 42 on the next page.

7 MR. MILLER: I'm sorry, Your Honor. That is the  
8 debtors' motion, Your Honor, to pay pre-petition excise and  
9 withholding taxes. We have agreed -- there's an objection  
10 filed, Your Honor, by the Walt Disney Company. We've agreed to  
11 discuss that with the Walt Disney Company and bring it back on  
12 November 18th.

13 THE COURT: Fine.

14 MR. MILLER: We can go to the contested matters, Your  
15 Honor, which relate to Lehman Brothers Inc., et al. and then go  
16 to LBI, Lehman Brothers Inc., if that's --

17 THE COURT: Fine.

18 MR. MILLER: -- agreeable to Your Honor.

19 THE COURT: That's agreeable.

20 MR. MILLER: Okay. The first contested matter, Your  
21 Honor, is the motion of DNB Bank ASA for stay relief or, in the  
22 alternative, an order requiring the debtors to provide adequate  
23 protection. This relates, Your Honor, to a deposit of  
24 approximately 18.5 million dollars. It's actually in Swedish  
25 krona, Your Honor. And the moving party would like to have the

1 stay lifted. We are in negotiations, Your Honor, to try and  
2 resolve this matter. The debtors are agreeable to the  
3 conversion of the krona into U.S. dollars to protect it against  
4 deterioration in value. The parties have agreed that there  
5 should be final hearing on December 3. In the interim, there  
6 would be expedited discovery to see if this matter can be  
7 resolved and then bring it forward to December 3 which I think  
8 is an omnibus hearing date, if I recall correctly, Your Honor,  
9 if it can't be resolved prior to that date. I don't know if  
10 counsel is here --

11 MR. UZZI: Your Honor, pardon me, Gerard Uzzi of  
12 White & Case on behalf of DNB NOR Bank. That, for the most  
13 part, accurately reflects our agreement, Your Honor, with one,  
14 I think, nuance. The next omnibus hearing date is November  
15 14th --

16 THE COURT: November 18th.

17 MR. UZZI: 18th, I'm sorry, 18th. I think both  
18 parties want to work toward getting to a final hearing if we  
19 need a contested hearing, an evidentiary hearing by the 18th.  
20 We're using the 3rd as a fallback in the event that we can't  
21 get it done by the 18th. But our hope would be that we resolve  
22 this consensually by the 18th, that the parties are ready to go  
23 forward on the 18th. If we haven't otherwise resolved it  
24 consensually, then we will want to go forward on the 18th as a  
25 final hearing.

1 THE COURT: I don't think you mean the 18th. Maybe I  
2 misunderstood you. I thought that this was being put off to a  
3 possible hearing on the 3rd. What happens on the 18th?

4 MR. UZZI: It's really being put off, Your Honor, to  
5 the 18th but there's a recognition that my client's in Norway,  
6 the debtors may want to take some discovery. And if we're  
7 unable to resolve the matter consensually, either on the merits  
8 or with respect to providing discovery so that the parties are  
9 ready to go forward on the 18th, we've agreed that we would  
10 then adjourn it to the 3rd. But in no event would we adjourn  
11 it later than the 3rd so that we would have the final hearing  
12 on the 3rd.

13 THE COURT: All right. Well, here's my take-away  
14 from this.

15 MR. UZZI: Yes.

16 THE COURT: If you have a consensual resolution, it  
17 can be approved on the 18th. Otherwise, there will be a  
18 hearing on the 3rd. But since you don't control the calendar,  
19 you can't tell me that that's the last permissible date. It  
20 will be ultimately up to me when this happens.

21 MR. UZZI: Understood, Your Honor.

22 THE COURT: Okay.

23 MR. UZZI: And I didn't mean to imply otherwise. I  
24 just meant the agreement between the parties.

25 THE COURT: Okay. I understand the agreement. Okay.

1 MR. UZZI: And then just, Your Honor, the -- we are -  
2 - we've reached an agreement also on adequate protection, as  
3 Mr. Miller said, that my client can convert the krona account  
4 to U.S. dollars at its discretion in order to protect it  
5 against currency fluctuations. And we're fine with that being  
6 just a memorialization on the record, Your Honor. But if Your  
7 Honor would prefer a written order on that, we would be happy  
8 to submit a written order also.

9 THE COURT: Well, it's up to you as to how much  
10 protection you want as you convert kronas into dollars. I  
11 assume with the consent of Mr. Miller on behalf of the estate  
12 and with your stating the intention to do it as a form of  
13 adequate protection, I'm confident that you're free to proceed  
14 without further documentation. But if, for your own  
15 protection, you want that documentation, go right ahead and  
16 produce it.

17 MR. UZZI: No, that's fine, Your Honor. We just want  
18 to make sure the Court was aware.

19 THE COURT: I understand. Thank you.

20 MR. UZZI: Thank you. May I be excused, Your Honor?

21 THE COURT: You may.

22 MR. UZZI: Thank you.

23 MR. MILLER: I just want to make clear, Your Honor,  
24 to get to a resolution on November 18th depends upon expedited  
25 discovery. And as counsel pointed out, because the moving

1 party is in Sweden, there may be some delay. That's why we did  
2 that backup.

3 MR. UZZI: We're fine with expedited discovery.

4 THE COURT: Is it Norway or is it Sweden?

5 MR. UZZI: It's Norway, Your Honor.

6 MR. MILLER: I'm sorry. Scandinavia, Your Honor.

7 THE COURT: Okay. Fine.

8 MR. MILLER: And in one election and the dollar  
9 suddenly became a solid currency. Your Honor, the next matter  
10 is the cash management order. Mr. Perez will handle that.

11 MR. PEREZ: Good morning, Your Honor. Alfredo Perez.  
12 Your Honor, there's a footnote on the G-IV sale motion that I  
13 neglected to tell Mr. Miller. And that is there's a footnote 8  
14 in the supplemental motion that talks about rights and  
15 obligations being assigned. And that is a little incorrect.  
16 The purchaser -- Pegasus is obligated to pay the money. They  
17 will then assign the right to take the liberty of the contract  
18 but they're not assigning the obligation to pay. And I just --  
19 I told the creditors' committee I would put it on the record  
20 and I just wanted to make sure that that was on the record.

21 THE COURT: Okay. Fine.

22 MR. PEREZ: Thank you, Your Honor.

23 THE COURT: Now we'll proceed with what you stood up  
24 to talk about.

25 MR. PEREZ: I apologize.

1 THE COURT: No, it's fine.

2 MR. PEREZ: Your Honor, we have two remaining  
3 objections left to the cash management order. The agenda  
4 reflects that the informal committee was still objecting. As a  
5 result of discussions with them through the course of the day  
6 yesterday, I think they have withdrawn any objection to it. So  
7 the only two objections that remain and one, I didn't find out  
8 in time, is Mr. Sabin's objection with respect to the desire to  
9 have the actual amounts advanced back and forth posted on a  
10 website which based on lots of good reasons we don't think is  
11 appropriate to tell people where we're moving money and what  
12 entities are supporting. And then the second objection, which,  
13 frankly, I read more as a reservation of rights or a statement,  
14 is the limited objection filed by the LBIE trustee. We think  
15 both of those objections were considered at the time of the  
16 interim hearing. They were either withdrawn or overruled by  
17 the Court. We think that the Court should likewise do the same  
18 thing right now. We have made several changes to the form of  
19 the order primarily to accommodate individual requests by the  
20 creditors' committee and by other parties. The last change,  
21 Your Honor, reflected a request -- we're obtaining second liens  
22 on some assets in which we advance. And in one situation, the  
23 first lienholder properly said well now, you're going to make  
24 me come into court if -- if I have a negative pledge and I let  
25 you get a second lien and now you're going to make me come in

1 to court if I want to enforce my first lien, we thought that  
2 was an appropriate request. And so that's been carved out from  
3 the order and in consultation with the committee, I think  
4 they're fine. They recognize that that would be the result  
5 that would ensue were we not in bankruptcy.

6 So, Your Honor, with that, we would request entry of  
7 the order.

8 THE COURT: Okay. Well, Mr. Sabin is here to talk  
9 about his desire to have issues relating to cash movement  
10 posted on a website. And I think I also want to hear from  
11 counsel for LBIE concerning their position which is in a  
12 pleading but I don't think we should have Mr. Perez assume that  
13 I've already ruled on that.

14 MR. SABIN: Good morning, Your Honor. Jeff Sabin  
15 from Bingham McCutchen on behalf of the Harbinger Funds. Mr.  
16 Perez was partially right. We do not seek notice being posted  
17 as to every transfer. We seek just limited notice. And if you  
18 have the form of order, it is the decretal paragraph 10 that  
19 I'm referring to. And in addition, what we are seeking is as  
20 follows. Under that proposed paragraph as we now read it, and  
21 it has been further negotiated with many benefits, we would  
22 admit, as a result of the negotiations with the committee  
23 involved, with the debtors and with various other parties in  
24 interest including Harbinger. Effectively, what we are seeking  
25 is that if under that paragraph, the debtors are required to

1 give a notice to the committee and the notice is -- or,  
2 basically, if there is a particular single transaction of cash  
3 from an estate to a nondebtor affiliate of twenty-five million  
4 or more or a series of transactions during a month of forty  
5 million or more or if there is a transaction where  
6 notwithstanding commercial efforts that could not be attained a  
7 note evidencing the transaction between the debtor and a  
8 nondebtor that exceeds five million dollars, then, as I read  
9 the paragraph, a notice is supposed to go to the committee with  
10 supporting documents and a rationale. And the committee then  
11 has a limited period of time to talk with the debtors about the  
12 rationale or, in essence, object and seek to have a hearing  
13 before this Court where you would decide the propriety of the  
14 proposed transaction.

15 The only thing that Harbinger is seeking is that a  
16 copy of that notice with the supporting detail be put on the  
17 website that Mr. Miller referred to is now in process of being  
18 formed in a fashion such that such notices could be posted  
19 there. We think that is appropriate in this case given the  
20 need for transparency. We also think it appropriate because we  
21 are not asking for the ranks that the committee has under the  
22 order. So that, in effect, if any creditor, whether it was the  
23 Harbinger Funds or any other creditor in this estate or party  
24 in interest, saw that notice and wanted to object or wanted  
25 information, they could seek it from the debtors, they could



1 seek it from the committee or at their own cost and peril, they  
2 could come to this Court and try to get an emergency hearing  
3 before it to stop it.

4 Our concern is that, effectively, the debtors are on  
5 both sides of this transaction. Mr. Marsal and others are the  
6 CRO controlling the debtors and controlling the nondebtors. So  
7 it's not as if the transactions are necessarily arm's length.  
8 And in addition, we have concern that notwithstanding and  
9 appreciating what the committee does, has done and will do in  
10 this case is it sometimes may find itself in a conflicted  
11 situation as it stands for creditors in different silos, if you  
12 will. And not all creditors are similarly situated with  
13 respect to all debtors or with respect to the nondebtor  
14 affiliates.

15 And so, for all of those reasons, Your Honor, and  
16 given our understanding that the website is in process of being  
17 up and, probably the limited cost of just taking a copy of the  
18 notice and posting it, we would ask this Court to, in essence,  
19 modify the order in that paragraph to require such notice to be  
20 sent to the website. Thank you.

21 THE COURT: Okay. Why don't we deal separately with  
22 this issue before going to the LBIE. And I understand your  
23 position. I think Mr. Miller is prepared to respond or at  
24 least he's standing and now approaching the microphone. So I'm  
25 expecting to hear a few words.

1 MR. MILLER: If Your Honor please -- are you going to  
2 stand behind me? If Your Honor please, these fundings relate  
3 to obligations to protect assets. They are very sensitive.  
4 People are trying to get information to see what Lehman's going  
5 to do about protecting positions it has in certain commercial  
6 enterprises, whether it's going to fund an investment which it  
7 has in real estate and if Lehman doesn't fund or funds the  
8 changes of value of that transaction. These are very  
9 confidential, Your Honor. And to put it on a website is giving  
10 distressed debt traders an opportunity to get inside  
11 information which they're not entitled to. These are very  
12 sensitive things. That's why it's very confidential within the  
13 committee. If Mr. Sabin's client, which I must say, Your  
14 Honor, owns a claim on a terminated -- two terminated  
15 derivatives contracts and that's the only claim, where these  
16 transfers are going, Your Honor, and what these funds are being  
17 used for really doesn't affect that claim, Your Honor. All I  
18 would point out to Your Honor, these are very confidential  
19 fundings to protect assets. They're not made unless there is  
20 an asset to be protected. And if they don't make the funding,  
21 it changes the value of that investment. And that's inside  
22 information or confidential information, Your Honor.

23 THE COURT: Thank you, Mr. Miller. Let me ask  
24 counsel for the committee something. Mr. Dunne, I'm reminded  
25 of an argument that took place -- I think it was at the first

1 omnibus hearing that we had in the auditorium. And you'll note  
2 that I have chosen not to have the hearings in the auditorium  
3 at least for the time being because I found that to be a  
4 somewhat uncomfortable venue. But counsel for the ad hoc  
5 noteholders group or committee was seeking information  
6 directly. And I took the position at that time that the ad hoc  
7 committee could enter into some kind of conduit arrangement  
8 with the creditors' committee to obtain information from the  
9 committee subject to confidentiality restrictions. I'm  
10 wondering out loud whether or not an arrangement such as that  
11 would work to satisfy Mr. Sabin's concerns for transparency.  
12 And I'm wondering whether or not anything has happened in  
13 connection with the ad hoc committee's request for information  
14 or that of any other creditors or creditor groups to obtain  
15 information through the creditors' committee. It's certainly  
16 one of the committee's functions to provide reasonably accessed  
17 information subject to confidentiality restrictions.

18 MR. DUNNE: Your Honor, let me address that in two  
19 parts. With respect to what's transpired, particularly vis-a-  
20 vis the ad hoc committee of noteholders since the colloquy that  
21 we had several weeks ago, I think that there's been progress in  
22 both putting that infrastructure in place with appropriate  
23 confidentiality agreements and we've developed a working  
24 relationship. We spent a lot of time talking about pending  
25 matters with the ad hoc committee making the advisories to the

1 committee available to them. And I'd like to take some credit  
2 for why many of those objections have been resolved because  
3 they've been getting access to some of the views that Houlihan  
4 may have on a particular transaction or FTI. And I think  
5 that's precisely why Your Honor requested that we serve in that  
6 type of role plus, you know, the statutory obligations that we  
7 have.

8 THE COURT: Right.

9 MR. DUNNE: With respect to the cash management  
10 issues and precisely what Mr. Sabin is requesting, we started  
11 this process by talking with the debtors and looking at  
12 transparency as being a goal that in and of itself is worth  
13 achieving here but then spent time with Mr. Miller and Mr.  
14 Marsal about -- hearing their concerns about the unintended  
15 consequences of posting to a website if particular parties are  
16 looking out for a particular investment that may benefit them  
17 and only them at the expense of creditors and the estate at  
18 large.

19 So that's a long way of saying I'm fine working with  
20 Mr. Sabin and his client with appropriate confidentiality  
21 agreement subject to Mr. Miller and Mr. Marsal saying that a  
22 particular transaction is appropriate to be shared through us  
23 with them and doesn't raise the concerns that they have been  
24 articulating.

25 MR. MILLER: As of Monday, Your Honor, we finalized

1 confidentiality agreements with the ad hoc noteholder committee  
2 members only. Each member had to sign. And we did sign a  
3 confidentiality agreement with Akin Gump so that they could  
4 participate. Now, in the past, Your Honor, we have asked  
5 Harbinger to sign a confidentiality agreement and they've said  
6 they don't want to sign a confidentiality agreement. So  
7 there's some -- something to be inferred from that.

8 THE COURT: Well, I think we're not going to go there  
9 for now. So, Mr. Sabin, you don't need to comment with regard  
10 to that aspect of Mr. Miller's last remark. But I am sensitive  
11 to both the needs and the desires of parties in interest to get  
12 as much information as they can without restricting themselves  
13 and the appropriate needs of the debtor to preserve  
14 confidential transactions and proprietary information from  
15 unnecessary scrutiny which could either harm the debtor or  
16 provide unfair advantages to the parties seeking the  
17 information. And so my inclination, based upon what I've  
18 heard, is to deny the request that you've made for the cash  
19 management procedures to be modified by means of a posting of  
20 the notice that's going to the creditors' committee, but to  
21 encourage instead that alternative means be adopted to provide  
22 your client and others who may have similar desires to obtain  
23 information. To obtain it through alternative means,  
24 principally through the creditors' committee as an organization  
25 whose mandate includes the dissemination of information to

1 creditors and others parties in interest represented by the  
2 committee. Why does that not work for you? Or does that work  
3 for you?

4 MR. SABIN: I will make it work for our client. I  
5 understand it. I just want to make sure that I understand the  
6 debtors' position in response to Mr. Dunne's position, which is  
7 if, indeed, our client, or any other creditor, goes and  
8 negotiates the appropriate confidentiality agreement to protect  
9 the information that it would hope to receive through the  
10 committee, that, indeed, it won't be thwarted when the  
11 committee turns around and says dear debtor, can I give it to  
12 X, Y and Z who signed confidentiality?

13 THE COURT: I guess that question is will you bargain  
14 in good faith, Mr. Miller?

15 MR. MILLER: Absolutely, Your Honor.

16 THE COURT: There we go. No problem.

17 MR. SABIN: Then I think we're resolved, Your Honor.  
18 Thank you.

19 THE COURT: All Right.

20 MS. LAHAIE: Good morning, Your Honor. Meredith  
21 Lahaie, Akin Gump Strauss Hauer & Feld on behalf of the  
22 Informal Noteholder Group. Just a couple of things. First,  
23 with respect to the cash management motion, now, Your Honor,  
24 the representations are correct that the Informal Noteholder  
25 Group has decided to withdraw its objection based on our

1 conversations with the debtors and the oversight provided to  
2 the committee with respect to the nondebtor transfers.  
3 Secondly, Your Honor, with respect to the transparency issues  
4 that you raised a minute ago, the representations made here are  
5 correct, that Akin Gump and one committee member from the  
6 Informal Noteholder Group have signed confidentiality  
7 agreements and we are working together with the creditors'  
8 committee to get that download. And thus far they've been very  
9 accommodating so we are very appreciative of the reference.

10 THE COURT: Good. That takes care of the  
11 transparency question, but we still have the LBIE issue to deal  
12 with. I just want to make sure that the position paper that  
13 was filed by the administrators of the LBIE estate gets  
14 appropriate attention this morning.

15 MR. FLICS: Thank you very much, Your Honor. Martin  
16 Flics of Linklaters LLP on behalf of the joint administrators  
17 of LBIE. Your Honor, although we have a small disagreement  
18 with the debtors about what is appropriate for inclusion in  
19 this cash management order on a particular issue, I should  
20 state at the outset that we have been working very  
21 cooperatively, all parties have, on a very regular basis.  
22 Alvarez and Marsal and PWC are involved in daily discussions on  
23 a whole range of issues. Very complex, very hardworking.  
24 Everyone, as far as we can tell, is working in good faith to  
25 resolve some incredibly difficult issues. And I do want to

1 acknowledge that.

2 And, second, with respect to the concept of a  
3 protocol I also want to confirm Mr. Miller's statements earlier  
4 that there have been meetings on that. There was, I believe, a  
5 productive meeting just yesterday for a number of hours in  
6 which Mr. Perez and Mr. Kobak and myself and clients  
7 participated in which we worked through a number of these very  
8 difficult issues.

9 Having said that, and despite that good faith of all  
10 parties, there is much still to be done. We are faced with the  
11 issue of having to address a particular motion brought to the  
12 Court by the debtors, and it's only in that context that we  
13 come forward and have made a request. And that request is a  
14 limited one. The request is simply that to the extent that  
15 LBHI determines that it has no interest in funds that are  
16 misdirected to it post-petition because of the pre-petition  
17 cash management arrangements, then it will segregate, account  
18 for, and return those funds. So it is if LBHI agrees. And we  
19 only advanced this because this is a cash management motion.  
20 These issues derive specifically from the cash management  
21 arrangements. That is our only request. We have indicated to  
22 LBHI our willingness to cooperate on many issues, and I might  
23 add, Your Honor, that just in the last day or two the  
24 administrators have scheduled a creditors meeting for November  
25 14th in connection with that. They have submitted a document



1 to creditors, and that document is very express in addressing  
2 LBHI, that it's the intention of the administrators to  
3 cooperate, to agree on operating protocols, and otherwise a  
4 relationship that mitigates the need to go before courts.

5 THE COURT: Let me ask you this, Mr. Flics. You  
6 indicate that you are taking this position because there's a  
7 cash management motion which is about to be approved. But  
8 isn't it also true that the segregation, accounting, and return  
9 that you describe is something that could be provided for in  
10 the kind of protocol that you are in the process of negotiating  
11 that I gather is not yet in final form. As a result, assuming  
12 that an agreement is reached with respect to such a protocol,  
13 wouldn't more specific understanding take priority and then  
14 govern the relationship between LBIE and LBHI?

15 MR. FLICS: Your Honor, that is absolutely possible.  
16 And I expect that at such time as a protocol is agreed to, and  
17 there are a lot of complicated issues, but assuming, and we all  
18 hope that there will be one, I would expect that that would be  
19 included. But I think that that cannot, and should not,  
20 preclude that where there are very specific issues that are  
21 brought to the Court and I believe, in this case, make a very  
22 narrow request, it's not inconsistent with continuing to  
23 negotiate, and we absolutely have every intention. It is just  
24 that we are put in the position, through no bad intention of  
25 anyone, of addressing a motion that does address cash

1 management. We do believe these issues relate to that. Is it  
2 possible to do it another way? We could sign a stipulation  
3 tomorrow with the debtors that says the same thing. I cannot  
4 say that it must be in a cash management motion, but I do  
5 believe it is appropriate.

6 THE COURT: Well, since you've taken the position  
7 that it isn't required that it be in the cash management order  
8 it won't be. The reservation of rights that you've made is  
9 clear. It's both in the written form that you submitted which  
10 is part of the docket and now in the reservation of rights that  
11 you've made on the record of today's hearing. I understand  
12 your position, and as far as I'm concerned the fact that there  
13 is no language in the cash management order dealing with the  
14 segregation, accounting, and return of misdirected property  
15 does not preclude an appropriate motion at some time in the  
16 future by any party in interest, not just LBIE, to seek the  
17 return of property that belongs in another estate.

18 So, for that reason I am going to overrule this to  
19 the extent it's deemed an objection, but note that I believe  
20 you have other fully suitable means to achieve the same result.

21 MR. FLICS: Thank you, Your Honor.

22 THE COURT: Mr. Perez, sir, you're now satisfied?

23 MR. PEREZ: Yes, Your Honor. Thank you very much.

24 THE COURT: Okay. So the cash management order will  
25 go final at this point, and I have seen a form of order that

1 was -- a notice of order was put on the docket a number of days  
2 ago. Has that been updated?

3 MR. PEREZ: It has changed, Your Honor. In  
4 particular the reference that I had made to when we put on a  
5 second lien making sure the stay doesn't apply to any first  
6 lien, but we will provide you a black line of the revised  
7 order.

8 THE COURT: Fine. Okay.

9 MR. MILLER: Item number 17, Your Honor, is the  
10 motion of Sumitomo Mitsui Banking Corporation. It's their  
11 motion, Your Honor.

12 (Pause)

13 THE COURT: Mr. Perez, you may be excused.

14 MR. CONLON: Good morning, Your Honor. John Conlon  
15 of Mayer Brown for Sumitomo Mitsui Banking Corporation.

16 By way of background, Sumitomo or SMBC is a party to  
17 a credit agreement with Lehman Brothers Holding Inc. as  
18 borrower and Lehman Commercial Paper Inc. as pledgor, dated May  
19 27, 2008. Pursuant to that loan agreement SMBC extended a 350  
20 million dollar term loan and received in return security a pool  
21 of term and revolving loans that LCPI owned and were identified  
22 from time to time.

23 We're here today seeking a relief from the automatic  
24 stay with respect to recovering that collateral because the  
25 value of that collateral has dropped precipitously over the

1 last month.

2 Under 362(d)(2) we're entitled to relief from the  
3 automatic stay if the debtor does not have equity in the  
4 property and the property is not necessary for an effective  
5 reorganization. There's no argument that's been made that this  
6 property is necessary for effective reorganization so I'll  
7 focus on the first point.

8 There's a three step showing that must be made by a  
9 secured creditor. First, as to the amount of the claim. Here'  
10 it's approximately 350 million dollars and there's no dispute  
11 about that. The second is that the claim is secured by a  
12 valid perfected lien on the property. There's no dispute that  
13 we have appropriately filed UCC financing statements. Third,  
14 that the debtor does not have equity in the property.

15 As set forth in the submissions that are before Your  
16 Honor, as of the petition date my client was owed approximately  
17 350 million dollars. And as further set forth, the value of  
18 the security that's supporting that 350 million dollar  
19 obligation is now worth approximately 313 million dollars.

20 THE COURT: Let me stop you there.

21 MR. CONLON: Sure.

22 THE COURT: Mr. Buck has provided two declarations,  
23 an original at the time that you filed the motion and a  
24 supplemental declaration filed within the last day or two.  
25 Both of those declarations reference the loan X intermediary

1 for distressed loan trades as a source of valuation data.

2 MR. CONLON: Yes.

3 THE COURT: On the basis of which he, and now you in  
4 argument, assert the value has dropped.

5 MR. CONLON: Yes.

6 THE COURT: I don't think you can get where you want  
7 to go by saying that because you haven't proven anything but  
8 making the assertion. It doesn't mean that you can't prove it  
9 at some point.

10 Are you standing here and saying that that is the  
11 functional equivalent of a market value for marketable  
12 securities quoted on a particular day, because I don't think  
13 you can be saying that.

14 MR. CONLON: Well, it --

15 THE COURT: I could rely on that but I'm not sure I  
16 can rely on a loan X bid as being the functional equivalent of  
17 value. And if that's your position, you're going to lose  
18 today.

19 MR. CONLAN: Your Honor, loan X shows the range of  
20 values that bids and offers are made for a particular loan on  
21 any given day. They polled all dealers who participate in the  
22 system and come up with the arithmetical mean of those bids and  
23 offers.

24 We have supplemented the loan X data by reporting in  
25 the supplemental Buck declaration actual quotes from a number

1 of dealers including the debtor, while the debtor was still  
2 providing such information. And the debtor's -- in terms of  
3 the debtor's quotes, they tied in almost precisely with the  
4 loan X reported arithmetic mean.

5 In addition, they also tied in to the valuations that  
6 debtors provided while they were in operation, as they were  
7 required to under the loan agreement, where they valued the  
8 underlying loan portfolio themselves. All those valuations tie  
9 in, for the most part, within a hundred basis points.

10 The loan agreement contemplates valuing these loans  
11 at market value. We have shown what the market is for these  
12 loans.

13 THE COURT: Let me ask you this, because this is a  
14 question that interests me. If a loan agreement talks in terms  
15 of valuing the collateral, and these are all -- there are seven  
16 commercial loans, as I understand it.

17 MR. CONLON: Eight.

18 THE COURT: Eight?

19 MR. CONLON: Yes.

20 THE COURT: I read in the paper it's seven,  
21 somewhere.

22 MR. CONLON: Well, there is one that's both a term  
23 and revolving loan. So for purposes of valuation we combined  
24 the two.

25 THE COURT: Okay. The revolver is also one that is,

1 if I recall what I've read, is more difficult to value?

2 MR. CONLON: Yes. So to the debtor's benefit we  
3 valued that at par, along with the other term loan.

4 THE COURT: Okay. But here's the question. Assuming  
5 that parties have agreed, by contract, to value collateral at  
6 market value and that there is an industry practice that  
7 parties to the transaction engage in routinely to determine  
8 value, is that binding on a Bankruptcy Court and should it be?

9 MR. CONLON: Well, to the extent that the Bankruptcy  
10 Court is enforcing the terms of a written agreement, which I  
11 believe should be here, and our rights under the UCC, I believe  
12 it should be. Yes, Your Honor.

13 THE COURT: So are you saying that parties to a  
14 contract can dictate how a Court should determine valuation  
15 questions? You can't be saying that.

16 MR. CONLON: I'm not saying that.

17 THE COURT: So what are you saying?

18 MR. CONLON: I'm saying that the contract sets out a  
19 mechanism for valuation and in absence of some other reason to  
20 use that methodology, that methodology should be employed.

21 THE COURT: Okay. What's a Court that applies the  
22 Federal Rules of Evidence supposed to do? Shouldn't there be  
23 an evidentiary hearing and shouldn't the validity of the market  
24 data that you rely on be tested, subjected to cross-examination  
25 and also exposed to differing valuation methodologies in order

1 for the Court, as a finder of fact, to confirm one way or  
2 another what the value is as of the relevant valuation date.

3 MR. CONLON: Well, Mr. Buck is here today and  
4 available.

5 THE COURT: We're not having a valuation hearing  
6 today. Under Local Rule 9014-2 the first hearing, unless I  
7 order otherwise, of any matter which is called is not an  
8 evidentiary hearing. No one contacted my chambers to request  
9 that this be an evidentiary hearing and it's not.

10 You may, on some other occasion, have an evidentiary  
11 hearing and it will probably not be on an omnibus hearing date.  
12 Because my experience with valuation hearings tells me that  
13 it's likely to be more than half a day, it might be multiple  
14 days.

15 MR. CONLON: My response to the need for, for  
16 example, discounted cash flow or the like of the underlying  
17 collateral is that it should not be necessary here because the  
18 parties contracted for valuation. Whether a discount of cash  
19 flow or some other valuation shows an underlying value or the  
20 fundamentals of the loans are different, that the loans are  
21 worth more or worth less than the market value shouldn't impact  
22 our ability to recover and protect ourselves, given the  
23 apparent drop in the value.

24 THE COURT: Did I just hear you say the market value  
25 shouldn't affect your rights?



1 MR. CONLON: No, the market value should. If there  
2 is an analysis of discounted cash flow or some other valuation  
3 technique which indicates a value different from the market  
4 value, that should not affect our ability to protect our rights  
5 which are based upon the market value of the loan portfolio.

6 THE COURT: So are you standing at the lectern and  
7 arguing that even if a Court is persuaded that there is a more  
8 reliable valuation metric which determines value, that that's  
9 trumped by your agreement. Is that your position?

10 THE COURT: I'm not saying that, Your Honor. I'm  
11 saying that the -- that it would not be more -- in this  
12 situation it would not be more reliable, the underlying  
13 fundamentals would not be a more reliable indicator of the  
14 value of this portfolio then the market indicates.

15 THE COURT: Your papers also talk in terms of  
16 adequate protection. Adequate protection as of what date,  
17 protected how?

18 MR. CONLON: Well, there's a variety of issues. One,  
19 there is cash coming in, there's interest payments being made.  
20 So there's cash presumably being received by the debtor. We  
21 would like to have that cash segregated and subject to adequate  
22 protection so that that cash can be -- which is ours under the  
23 cash collateral agreement, that we have some assurance that  
24 that's not being applied to other purposes of the debtor.

25 We would also like to have, to the extent that there

1 are shortfalls, as we think we've demonstrated but to the  
2 extent that there are shortfalls that the loans be substituted  
3 out as appropriate for that cash, these be deposited into a  
4 segregated account to make up the difference.

5 THE COURT: I don't understand the reference to  
6 substituting out the loans.

7 MR. CONLON: Well, the loan agreement provides that  
8 different loans can be taken in or out of the collateral pool  
9 to support the value of the collateral. And if there are  
10 other, more valuable loans that can be put in, that's what we  
11 would request.

12 THE COURT: So you're moving from stay relief at the  
13 same time you're seeking to substitute out loans that may have  
14 a higher value in some loan X type arrangement of valuation so  
15 as to increase the value of the pool that secures the 350  
16 million dollars in the Sumitomo loan, right?

17 MR. CONLON: We're asking for adequate protection  
18 which could be provided in a variety of ways. One is by cash,  
19 additional cash. And an additional manner would be additional  
20 or replacement liens to protect the value of our interest in  
21 the property.

22 THE COURT: Well, the only thing you're entitled to,  
23 as a matter of law, is protection against the diminution in  
24 value of your secured claim, correct?

25 MR. CONLON: Yes.

1 THE COURT: And the value of your secured claim is  
2 what?

3 MR. CONLON: 355 million.

4 THE COURT: No, that's the notional amount of your  
5 claim. The value of the claim is the value of the security.

6 MR. CONLON: Yes.

7 THE COURT: What do you assert to be the value of the  
8 security, because you're about to say something against your  
9 adequate protection interest, you recognize that I think?

10 MR. CONLON: Yes, I do. Yes. The value of the  
11 security is approximately 313 million.

12 THE COURT: Based upon the loan X --

13 MR. CONLON: That's the loan X bid price.

14 THE COURT: The loan X bids. Okay. I understand  
15 your position and I'm going to hear other counsel, including  
16 the debtor and the creditors' committee who filed papers in  
17 response to this. But just so you're all generally aware of  
18 how I'm thinking about this, you're not getting any relief  
19 today and I think I've made that clear because I believe that  
20 there is an evidentiary issue that's significant. An issue  
21 which as been raised both by the debtor and by the committee in  
22 their responsive papers. So it comes as no surprise to you.

23 I believe it makes sense for the parties to do the  
24 following, and I'm not, by saying this now, precluding any  
25 arguments to be made by either the debtor or the committee.

1 One, I think that the parties should determine what, if any,  
2 discovery is appropriate on the question of valuation,  
3 including valuation expert, individuals associated with the  
4 transaction or otherwise, who may have different views as to  
5 the fair value of the underlying collateral.

6 I think that there should be an understanding as to  
7 the date when valuation is being performed. One of the  
8 confusing aspects of this situation, as it has been presented,  
9 is that we're dealing with an asset pool, the value of which  
10 notionally varies daily. And without looking at any loan X or  
11 other intermediary data I'm guessing certain of the loans may  
12 be worth more today than they were worth a week ago. I'm just  
13 guessing that because yesterday was one of the most traumatic  
14 market increases on an election day in history. And while this  
15 is not directly driven by the stock market this is a trading  
16 market and that's your position. Your argument is this is  
17 driven by a trading market value. Which means that the numbers  
18 go up and down depending on what day of the week we're talking  
19 about and what's going on in the world economy or in the  
20 industrial economy, depending on the underlying borrower.

21 So I want to know what the effective date is for  
22 measurement and whether or not, from an adequate protection  
23 perspective, forecasting future value is a relevant  
24 consideration and whether that can be done.

25 The third thing I want to know about is adequate

1 protection of your interests. Because in your motion and in  
2 your supplemental brief there is a fallback to adequate  
3 protection but it's not at all clear to me, based on your  
4 papers and based upon what you've said, what adequate  
5 protection would consist of for these purposes. I believe that  
6 the parties might profitably spend some time talking to each  
7 other about what it would take to provide adequate protection,  
8 thereby avoiding what could be a very time consuming and  
9 potentially expensive hearing on valuation.

10 Finally, I'll make just a general comment. It  
11 concerns me that your client has been on a mission to obtain  
12 stay relief on what I'll consider to be an incredibly  
13 accelerated timetable. I'm not saying that it isn't your  
14 client's right to do that but I noted, with concern, that this  
15 foreclosure effort on the part of Sumitomo predates the  
16 commencement of the Lehman Commercial Paper bankruptcy itself.  
17 And that a notice appeared in the New York Times on October the  
18 6th relating to foreclosure, one day after the commencement of  
19 the case. No one has commented one way or the other as to  
20 whether that publication is a stay violation. I'd like some  
21 consideration of that, both by you, the committee and the  
22 debtor.

23 It also seems to me that since you and your client  
24 have been on a mission to achieve this result, you're going to  
25 be slowed down somewhat here. Your client's need for speed

1 will not override this Court's need to understand, fully, the  
2 facts that support your position. And I find, based upon  
3 having reviewed both of the Buck declarations that they are  
4 inadequate and fail to provide prime facie proof of an  
5 entitlement. That doesn't mean that you're not going to have  
6 the ability to prove it up in an appropriate hearing in the  
7 future.

8 I'll now hear from other counsel.

9 MS. HARVEY: Good morning, Your Honor. Diane Harvey  
10 from Weil Gotshal representing debtor, Lehman Commercial Paper,  
11 Inc.

12 I was going to start my argument that said that  
13 Sumitomo bared the burden to establish prime facie evidence and  
14 that they've failed to do so, but I guess Your Honor has, kind  
15 of, stolen my thunder on that. So I'd like to address one of  
16 the questions that Your Honor posed to Sumitomo's counsel,  
17 which is what is the ability of the Bankruptcy Court to assess  
18 the valuation of the collateral in the context of a contract  
19 that has been formed.

20 The bankruptcy cases which deal with lifting the stay  
21 and under the sections that Sumitomo is seeking, talk about a  
22 bankruptcy judge assessing the totality of the circumstances in  
23 making an assessment of what the value is. Your Honor, you  
24 don't have any restraint, contractual or otherwise, with  
25 respect to determining, from the facts and the evidence that

1 you will hear what the value of the collateral is. And the  
2 case law is very clear on this.

3 I took Mr. Buck's deposition yesterday, Your Honor,  
4 just in case there was an evidentiary hearing. I don't want to  
5 waste this Court's time going through it but I do want to make  
6 a couple of points.

7 Mr. Buck admitted, in his deposition, that he doesn't  
8 have any experience performing valuations of term loans, no  
9 experience whatsoever. He also testified that he wasn't even  
10 the one who made the determination of what type of technique to  
11 value the collateral. There's a whole bunch of other things I  
12 could tell you Mr. Buck testified to, I won't waste the Court's  
13 time. But those two indications alone, I think, justifies the  
14 fact that there is no prime facie evidence that has been proven  
15 here or that could be proven through Mr. Buck.

16 THE COURT: Let me ask you what may be a tough  
17 question, though, Ms. Harvey. Does the debtor have an ability  
18 through competent evidence to take the position that Sumitomo  
19 is oversecured here?

20 MS. HARVEY: You're right, Your Honor, that's a tough  
21 question. We have not gotten an expert to actually perform a  
22 valuation in connection with the recoverability of the term  
23 loans. The methodology that we believe would be the  
24 appropriate methodology in valuing term loans. I imagine  
25 though, Your Honor, that if this does go to an evidentiary

1 hearing that we would put in evidence with respect to that.

2 THE COURT: Okay.

3 MS. HARVEY: Thank you, Your Honor.

4 MR. TECCE: Good morning, Your Honor. For the  
5 record, again, James Tecce from Quinn Emanuel. Your Honor, I  
6 will be very brief, only to note that we have filed an  
7 objection which Your Honor is aware of. We support the  
8 debtor's position in opposing the stay relief for reasons  
9 which, I think, Your Honor has already noted in his remarks.

10 The one point that I would simply stress is the  
11 timing point which Your Honor touched on, I think tangentially,  
12 at the end of your remarks. One of the reasons why we did  
13 object was given the close proximity of the motion being filed  
14 to the LCPI case and that this, we think, involves some LCPI  
15 collateral. We're just concerned that allowing a motion to go  
16 forward so quickly after the petition date might invite a  
17 series of motions that would result in piecemeal dismemberment  
18 of the collateral while the debtors are still trying to find  
19 out and evaluate how the existing collateral may relate to the  
20 remainder of the estate and the best way to maximize the value  
21 of that collateral.

22 THE COURT: I understand that argument but it's  
23 actually one that I completely discount. I believe that the  
24 parties to transactions, not just in this case but in any case,  
25 are not held to an arbitrary time schedule. If there is a



1 right to obtain relief from the automatic stay there's no  
2 waiting period that the law requires or that I will impose.

3 Additionally, the notion that this is going to open  
4 up a floodgate of other potentially distracting requests for  
5 stay relief to the extent true, is also irrelevant. To the  
6 extent untrue is even more irrelevant. And my comments were  
7 not addressed to whether or not it was premature and might lead  
8 to other further stay litigation in the context of the Lehman  
9 bankruptcy case. But rather was focused on something that  
10 seemed to be in process even before the debtor commenced its  
11 case.

12 So we're talking about a request to foreclose, which  
13 as I understand it was undertaken because of the Lehman parent,  
14 LBHI's bankruptcy as a triggering event and that the motion  
15 itself was filed on October 15th, a mere ten days after the  
16 commencement of the Lehman Commercial Paper case. Now the fact  
17 that it was filed ten days after the commencement of the  
18 relevant debtor's bankruptcy petition is an indication of a  
19 very anxious creditor. Just because a creditor is anxious  
20 doesn't mean that the creditor isn't entitled to court time.

21 And so the issues is ultimately not about timing as  
22 much as it is about entitlement.

23 MR. TECCE: Very well, Your Honor. Thank you.

24 THE COURT: Okay.

25 MS. LAHAIE: Good morning, Your Honor. Again for the

1 record, Meredith Lahaie, Aiken Gump on behalf of the informal  
2 noteholder group.

3 Your Honor, we agree with the arguments made here by  
4 the debtors and we rest on papers.

5 THE COURT: Fine.

6 MR. CONLON: Your Honor, just one point I wanted to  
7 clarify. With respect to any repayments, in whole or in part,  
8 of any of the underlying loans, we'd request that, whether it's  
9 principle or interest but particularly principle, if there are  
10 any prepayments or payments of principle, that those be  
11 segregated as providing adequate protection for my client.

12 THE COURT: Okay. Those requests are all going to be  
13 made in the context of discussions to take place after today's  
14 hearing. I'm not ruling on adequate protection today. What I  
15 am doing is encouraging the parties to have some conversations  
16 about how to deal with your issues. And there will either be  
17 an evidentiary hearing on value or there'll be a stipulation on  
18 adequate protection. But I don't see anything other than that  
19 in the future.

20 If there's no agreement on adequate protection I'll  
21 certainly rule on what adequate protection consists of. But I  
22 may establish a briefing schedule on this as well because there  
23 are a number of issues that I raised that I think are if not  
24 unique at least unusual and I don't consider the Johnson case  
25 that was cited to be particularly helpful to either side.

1 So let's put this over as a status conference matter  
2 for the hearing on the 18th. And at the status conference I  
3 would like there to be a report on some progress, if any, in  
4 either completing a discovery schedule, I heard Mr. Buck's  
5 deposition was taken but I imagine that if the debtor hasn't  
6 yet engaged valuation experts that that may be the next step,  
7 if that's required. And that we talk about when an evidentiary  
8 hearing will take place.

9 My suggestion is that if we're going to have to go  
10 down that road that it not be on an omnibus hearing date but  
11 that we rather establish trial dates that take into account the  
12 reasonable estimates of litigation counsel as to how long it's  
13 going to take to present this case.

14 MR. CONLON: Very good, Your Honor. Thank you.

15 THE COURT: Okay.

16 MR. HARVEY: The next matter is number 18, the motion  
17 of the Federal Home Loan Bank of Pittsburgh for clarification of  
18 the order approving the Barclays sale, Your Honor.

19 MS. HARVEY: Your Honor, may I be excused to go to  
20 the back?

21 THE COURT: You may be excused.

22 MS. HARVEY: Thank you, Your Honor.

23 MS. MANNE: Good morning, Your Honor. Beverly Weiss  
24 Manne on behalf of the Federal Home Loan Bank of Pittsburgh.

25 THE COURT: Good morning.

1 MS. MANNE: Thank you. Your Honor, we have filed a  
2 very limited motion seeking some clarification with respect to  
3 the sale order entered by this Court. A couple of points to  
4 bring to the Court's attention. Pretty much the issue with  
5 respect to Rule 60 was addressed by Barclays. In this  
6 particular instance LBHI, who filed bankruptcy on September  
7 15th, is a credit support provider under an ISDA agreement with  
8 the Federal Home Loan Bank. Lehman Brothers Special Finance,  
9 who we like to refer to as LBSF, was the counterparty to that  
10 agreement and was to be holding 316 million dollars of  
11 collateral, and as of the date of the bankruptcy filing, as of  
12 the sale, those contracts had not, as of the date of the sale  
13 motion, of the hearing, there had not been a determination.  
14 That subsequently occurred and there was a subsequent net out  
15 and closeout of contracts.

16 On October 2nd Federal Home Loan Bank said here's the  
17 closeout, here's the net out, return collateral. On October  
18 3rd LBSF filed its bankruptcy proceeding. We filed a request  
19 immediately on October 3rd, once we were told hey, you're not  
20 getting your money back. We don't even know if we have your  
21 money. That was their response at that particular point in  
22 time. And at that point the question was where is the money?  
23 What gave us great concern also at that point in time was the  
24 debtors' filing of the motion for cash management, which seemed  
25 to indicate that as we talk about all roads leading to Rome,

1 that LBHI was Rome. The debtor had -- in the sale order we  
2 read that they transferred 1.3 billion in cash, cash  
3 equivalents, bank deposits or similar items. This was all  
4 approved by the Court. Now, arguably it was LBI, but because  
5 of the averments within the cash management motion as to cash  
6 going up and cash going out we had no way of discerning were  
7 there buckets, did money come in, did money come out. So we  
8 were concerned about the language. There was an averment that  
9 in -- subsequently there was a clarification letter.

10 Your Honor, what we seek today simply is further  
11 clarification in an order. We don't think the letter in and of  
12 itself is sufficient to constitute this Court's order. We  
13 think an order would be appropriate. This Court knows that if  
14 you're in a bankruptcy case the letter and the agreement among  
15 those parties aren't necessarily going to be viewed in the same  
16 manner two or three or four years down the road. We think a  
17 simple court order which specifies a few things, and we had  
18 some discussions with Barclays and had proposed some language  
19 for a stipulation. We want it to be very simple. And we did  
20 file, also, yesterday, Your Honor, a proposed order at document  
21 1369 with three very simple statements. One --

22 THE COURT: I saw that. I saw that order and I've  
23 read the papers that have been filed in opposition to the  
24 relief you seek. Everybody seems to be saying you don't need  
25 this. The order is clear. There's been a failure to comply

1 with the requirements of 60. That's Federal Rule 60.

2 MS. MANNE: Right.

3 THE COURT: That the clarifications made on  
4 September -- I forget the date of the letter. 21st, I think --  
5 is the clarification letter. And statements made in filings in  
6 connection with this contested matter tell you in multiple ways  
7 that no cash was conveyed to Barclays as part of the sale,  
8 which leads me to question why you need, why anyone needs, a  
9 clarification of the sale order which appears clear on its  
10 face.

11 MS. MANNE: Your Honor, the sale order, obviously,  
12 was not clear on its face to the extent subsequent to the sale  
13 order with respect to issues. There was a clarification  
14 letter. Clarification letter came afterwards.

15 THE COURT: The clarification letter did not modify  
16 the sale order. The clarification letter could not modify an  
17 order. The clarification letter was intended to clarify  
18 transactional documents.

19 MS. MANNE: Right.

20 THE COURT: That's certainly how I read it. So the  
21 order is what it is and unless the district court in connection  
22 with pending appeals were to upset it on issues of good faith  
23 it says what it says and it's final.

24 MS. MANNE: Your Honor, we're not disputing that it  
25 says what it says and it's final. We are saying that we did

1 not view the language, because the sale order specifically says  
2 that you're selling these assets, and it references back to the  
3 asset purchase agreement and the clarification letter. It says  
4 to state what those assets are and what the excluded assets  
5 are. You can't read it in a vacuum from the APA and the  
6 clarification letter. In that regard, Your Honor, it just  
7 simply was not clear. We don't know if it still is clear, and  
8 that's why we're here. If we thought it was crystal clear we  
9 wouldn't be here, Your Honor.

10 THE COURT: Well, let me understand something about  
11 the procedural setting in which this arises. I know that there  
12 is pending an adversary proceeding that your client has  
13 commenced with reference to the same funds.

14 MS. MANNE: That's correct, Your Honor.

15 THE COURT: I know that I've been advised in  
16 pleadings that the money that we're trying to track down, at  
17 least that you're trying to track down, allegedly is the  
18 subject of a JPMorgan Chase offset that as I understand it, but  
19 I don't know this to be true, may have taken place on October  
20 3rd as part of some kind of reconciliation of accounts. Now, I  
21 don't know where the money is. But let's just say, for the  
22 sake of discussion, that what I have been told and I'm now  
23 recounting to you is, in fact, true. And that the money that  
24 you're looking for was commingled with other funds, was in a  
25 JPMorgan account and was taken by JPMorgan. Let's just say

1 that's all true. How does anything that we're now talking  
2 about in reference to this sale order benefit you?

3 MS. MANNE: Your Honor, I think you've sort of put  
4 the bunny in the hat when you said let's assume. Where is the  
5 money?

6 THE COURT: Well, it's a question you're actually  
7 supposed to answer.

8 MS. MANNE: Oh, I'm sorry, Your Honor. Because if  
9 that were true, and if the evidence and facts showed that to be  
10 the case, then this is probably not an issue. You're right.  
11 That's not the case. But, Your Honor, we don't have the  
12 evidence in support of that. We have averments and pleadings.  
13 We don't have any evidence to say what's up. We do know that  
14 we had collateral. We do know that other counterparties had  
15 collateral. We do know that the debtor has mentioned they had  
16 8,500 counterparties. We don't know how much collateral they  
17 were supposed to have in those accounts. And the like. So,  
18 yes, Your Honor, at this juncture the averments to the Court  
19 and the representations to the Court as of the filings on  
20 Friday, but not prior to that time, were oh, the posted  
21 collateral was in the account at JPMorgan and JPMorgan swept  
22 those funds. But other than this averment by the debtor there  
23 is no evidence to that effect, and there wasn't any presented.  
24 The clarification we're seeking with respect to that is the  
25 issue as to how much money was at Lehman Brothers Special



1 Finance in those accounts, if it was our funds because it was  
2 supposed to be segregated, it was supposed to be held apart at  
3 Lehman Brothers Special Finance, transferred funds up, and even  
4 though they're saying they didn't, if they're supposed to have  
5 two billion dollars worth of collateral for these various  
6 counterparty accounts and they're saying they had 400 million  
7 dollars as of that date, you have to say well, where's the  
8 other 1.6 billion dollars, Your Honor.

9 So that is our big issue. Where is the collateral,  
10 because even today, with their comments, we -- fine, if they  
11 want to admit today, and we think, perhaps, this is an  
12 admission that out of the 415 million there that constituted  
13 our collateral, that's what they seem to be saying. If that's  
14 the comment today, and if the Court wants to find that today,  
15 that the 415, as of October 2nd, that was in there, constituted  
16 Federal Home Loan Bank collateral, we'll withdraw this, Your  
17 Honor. But no one's willing to say that. No one's willing to  
18 represent that. No one --

19 THE COURT: There's also nothing before me on the  
20 basis of which I could make such a finding. So that's not  
21 going to happen today.

22 MS. MANNE: That's right, Your Honor. And that's why  
23 we're here. Because we're -- maybe we're paranoid. But we are  
24 owed forty-one million dollars, and no one has told us where it  
25 is. And we just want to be in the position where if a sale

1 order is talking about transferring cash, and it went up into  
2 LBHI, and LBHI is this great octopus which sends funds out  
3 across the world in cash, they've represented to the Court that  
4 we did not sell this collateral. Barclays said we did not buy  
5 that collateral. We think it would be appropriate. I'd be  
6 happy to have a stipulation to that effect, Your Honor. I had  
7 asked that if, and subsequently it was determined, that, in  
8 fact, oops, it was your collateral. We did transfer it up. I  
9 wanted initially in the stipulation to say we'd have a lien or  
10 a trust imposed upon the proceeds. That was apparently  
11 unacceptable, Your Honor.

12 THE COURT: Well, you were in court when I was  
13 engaged in colloquy with Mr. Flicks as he was seeking to obtain  
14 certain benefits in the context of the cash management order  
15 that would protect rights of LBIE in the event that funds were  
16 misdirected. I mean, in a sense, what you're asking for is  
17 another variation on that theme of "I know they said that they  
18 didn't transfer the cash to Barclays, and I know they said that  
19 the funds that I'm merely interested in are the subject of some  
20 offset transaction with JPMorgan Chase, but we don't know those  
21 facts to be true." All I'm looking for is clarification in a  
22 sale order that says that's not true and that I don't have to  
23 worry in connection with the sale order.

24 But what I said to Mr. Flicks I think I can repeat to  
25 you. Nothing in the cash management order is intended to take

1 away the rights that LBIE or any other party may have as to  
2 misdirected cash. Those rights are what they are. Isn't the  
3 same true in connection with the Barclays sale order? They've  
4 said they don't have your cash. I'm sure they wouldn't have  
5 said it unless they knew it was true. And they've represented  
6 as publicly as the hearings that took place on the 19th and  
7 20th here that no cash was being acquired as part of the  
8 acquisition. From a clarification perspective, I don't think  
9 there's a need for clarification. I think it's clear on the  
10 record of the sale hearing and what the order says. But in  
11 terms of your own rights, don't you have the same ability in  
12 your pending adversary proceeding, and to the extent that isn't  
13 a workable procedural setting, any other motion you might file  
14 if facts ever come to your attention suggesting that everything  
15 that's been represented is, in fact, different?

16 MS. MANNE: Your Honor, the biggest difference here  
17 is that the sale order basically washed this cash. You have --  
18 if, in fact, the funds were transferred to Barclays, they were  
19 transferred free and clear, and the debtors, in exchange, got  
20 cash, which they're going to view as post-sale proceeds from a  
21 washed transaction. Now -- so to the extent you now have  
22 proceeds of a sale to Barclays, which was free and clear of  
23 liens and free and clear of interest in claims, that's the  
24 biggest difference here. That sale order cuts off rights, and  
25 that is our concern.

1 THE COURT: It's supposed to cut off rights. It's  
2 intended to cut off rights.

3 MS. MANNE: That's right, Your Honor.

4 THE COURT: I intended it to cut off rights.

5 MS. MANNE: And we know that to be the case, and that  
6 is the biggest difference here. That is fine. It can cut off  
7 rights. We expected that to be the case. But it can't -- one,  
8 they couldn't sell cash they didn't own, and even though  
9 they're saying we didn't sell cash, they transferred cash  
10 equivalents, bank deposits, similar cash items as part of the  
11 transfer. So where the funds in those accounts came from was  
12 there.

13 So I agree with you, Your Honor. I agree that it was  
14 supposed to be a permanent sale order. We're not looking to do  
15 that. We want clarification. They're saying they didn't buy  
16 the cash, our assets weren't included. Fine. The assets  
17 weren't included. It's very simple. They've made the  
18 representation, and that's all we're seeking, Your Honor,  
19 because at the end -- if I would propose the opposite scenario  
20 to the Court, it's nine months from now, they walk in and say  
21 oops, you know what, we're sorry, in fact, we found out that  
22 these funds were transferred, and they did go up to Barclays.  
23 Barclays' off the hook, and the debtor's going to say, you  
24 know, these were proceeds, and under a cash management order  
25 and under all these other orders we've been using them in the

1 ordinary course and those funds are gone as well.

2 Where are we at that point in time, Your Honor, if we  
3 took the opposite proposal of facts? We just don't have them.  
4 This order is very simplistic. It just says -- it's almost a  
5 placeholder to say you didn't sell cash, they didn't buy cash,  
6 our collateral's not included. And we didn't even put in  
7 anything else that grant liens the issues with respect to the  
8 adversary proceeding. We'll proceed independently of this. We  
9 just don't want an order which is intended to be final, and  
10 will be final, with respect to the sale to potentially divest  
11 us of rights if worst fears are realized. That's all, Your  
12 Honor.

13 THE COURT: Okay. I'll hear what the debtor and  
14 Barclays has to say.

15 MR. MILLER: I guess I'll go first, Your Honor,  
16 because I just found out I represent an octopus. Your Honor,  
17 there is no need to clarify the sale order. It was made  
18 perfectly clear. The clarification letter makes it clear there  
19 was no cash sold to Barclays. The problem with the proposed  
20 order, Your Honor, is it keeps talking about FHLB-posted  
21 collateral. There is no evidence that that collateral existed  
22 at any point in time. Counsel has an adversary proceeding  
23 pending. That adversary proceeding will deal with whether  
24 there was any posted collateral.

25 The LBSF account, Your Honor, was an account. The

1 money that was set off by JPMorgan Chase -- we had no idea that  
2 that was posted collateral. Unfortunately, LBHI, or LBSF, did  
3 not maintain a segregated account. There is no such thing as  
4 FHLB-posted collateral that can be identified and shown went  
5 someplace. Dollars are fungible, and these monies were all  
6 commingled. There were no separate, segregated accounts for  
7 this customer, Your Honor.

8 So the order that is proposed can't be signed because  
9 it needs an evidentiary background, Your Honor. There is no  
10 evidentiary background. We have stated unequivocally there was  
11 no cash sold to Barclays. If this posted collateral can be  
12 found someplace, that's a completely separate issue that will  
13 be determined in the adversary proceeding. Barclays has said  
14 it did not receive any cash. So why is there a clarification  
15 of a sale order necessary at this point in time, Your Honor?  
16 It just isn't. And the order can't be signed because there's  
17 no evidence to support the so-called posted collateral ever  
18 existing. Thank you, Your Honor.

19 THE COURT: Does Barclays wish to say anything?

20 MS. SCHWEITZER: Good morning, Your Honor. Lisa  
21 Schweitzer from Cleary Gottlieb Steen & Hamilton for Barclays  
22 Capital. I agree that we're here faced with a counterparty to  
23 a Lehman entity who wants information, and we all agree that  
24 they want information. They all agree they want to find out  
25 where their money is. It's helpful to me to have Mr. Miller

1 stand up and, in fact, confirm that there was no collateral  
2 account or where the money went because, facing Barclays, we  
3 don't know any of this. What we know is that we bought assets,  
4 that there were representations at the sale hearing that the  
5 debtor owned those assets. There were findings in the order  
6 that those were debtor assets being sold and that we're a good  
7 faith purchaser under 363(m) entitled to finality on that  
8 finding.

9 That said, we don't have to get into any hard issues  
10 today because what you're hearing from this side, and  
11 particularly with the debtor who is closer in information, is  
12 that their cash particularly did not pass up and did not pass  
13 over. And more generally, all the documents contemporaneous to  
14 the sale say that no general cash accounts passed over to  
15 Barclays.

16 So it's procedurally improper right now to be dealing  
17 with this, as you pointed out, in a Rule 60 motion. And I know  
18 FHLB says, well, look, comfort orders are great, we love  
19 comfort orders, but this is a case where floodgates are a  
20 potential risk here, is that we can't open the door to every  
21 potential counterparty who had any transaction with Lehman who  
22 says, well, even though the sale agreements and the sale order  
23 say one thing, I need comfort to make sure that's what they  
24 actually say. Well, this process will never end if we have to  
25 keep fighting off these motions. They have their adversary

1 proceeding. They have whatever discovery they're entitled to,  
2 and that's their remedy. So we would request, respectfully,  
3 that the motion be denied.

4 THE COURT: Is there anything more?

5 MS. MANNE: Your Honor, we appreciate Mr. Miller's  
6 comments, but that's all they are with respect to that because  
7 even though he's representing to the Court that there was no  
8 account or there wasn't an account, we --

9 THE COURT: But what evidence is there that the so-  
10 called FHLBP-posted collateral existed?

11 MS. MANNE: Before you today, Your Honor?

12 THE COURT: Yes.

13 MS. MANNE: We can -- we don't have that evidence  
14 before you today. This isn't the evidentiary hearing. If the  
15 Court needed that evidence, we could provide that evidence.

16 THE COURT: Well, I think that --

17 MS. MANNE: And that's part of the adversary  
18 proceeding. Your Honor, I am simply saying that all --

19 THE COURT: All I'm saying is this. Mr. Miller's  
20 comments went to the procedural setting in which you were  
21 seeking specific language of a clarification order. And what  
22 he said was, I'm paraphrasing, you can't get that because  
23 there's no evidence in the record that this posted collateral  
24 even existed as a segregated account. And I agree with him on  
25 that.



1 I think there's a more general question, though,  
2 which is, have you, through this motion, demonstrated that  
3 there is confusion in the original sale order, ambiguity as to  
4 the language of that order and a need for clarification with  
5 respect to that order? And I find that you have failed to  
6 demonstrate that, at least to my satisfaction.

7 I believe that the sale order speaks for itself, as I  
8 have said, was the product of a very intense process that many  
9 of us sat through on the 19th, into the 20th, and was entered  
10 early in the morning on September 20th, and I remember when  
11 that happened, very vividly. I think that the order,  
12 notwithstanding the intensity of the circumstances that  
13 produced it, represents a fully integrated, absolutely clear,  
14 and until somebody points out the ambiguities, unambiguous  
15 statement of the Court's approval of the sale transaction.

16 As a result, in the context of your client's need for  
17 further assurances with respect to the disposition of the cash  
18 that you're most concerned with, I see no need for  
19 clarification of the sale order and believe that the statements  
20 that have been made, both in the clarification letter, in the  
21 statements of counsel and the pleadings filed, provide all that  
22 you could possibly expect.

23 Additionally, to the extent that there is a way for  
24 you, by means of the adversary proceeding, to obtain discovery  
25 and/or a determination as to your rights, you have that

1 ability. And denial of this motion does nothing to strip you  
2 of those rights.

3 So your motion's denied, and it's without prejudice  
4 to your ability to seek whatever relief you can elsewhere.

5 MS. MANNE: Okay. Thank you, Your Honor.

6 MR. MILLER: Thank you, Your Honor. The adversary  
7 proceeding, Your Honor, has been put over to 4 p.m. this  
8 afternoon.

9 THE COURT: Let me explain something about the  
10 scheduling of that --

11 MR. MILLER: Yes.

12 THE COURT: -- just so it's on the record. We  
13 received a telephone call on Friday in chambers from counsel  
14 for the plaintiff in the adversary proceeding concerning the  
15 appearance of a witness in connection with the preliminary  
16 injunction. We scheduled a telephone conference. That  
17 telephone conference took place at 2:00 yesterday afternoon and  
18 involved counsel for the SIPA trustee, LBHI, the plaintiff,  
19 Evergreen Solar, and Barclays. And as a result of that purely  
20 procedural discussion that took place off the record, I  
21 determined, and it may not have been a correct determination in  
22 terms of the way the calendar's going, that given that that  
23 might take as long as three hours to hear, that it made sense  
24 to move it to the end of the calendar.

25 I also pointed out, and I'm going to mention this now

1 on today's record, that I have a somewhat longer than typical  
2 lunch commitment for today and need to adjourn just before  
3 12:30, and I'll probably be back by 2:30. So with that  
4 understanding, is there sufficient time for us to go through  
5 the SIPA proceeding agenda before lunch?

6 MR. MILLER: I was going to defer to Mr. Kobak, Your  
7 Honor.

8 THE COURT: Because if we can, I think we should do  
9 it.

10 MR. KOBAK: I hope so, Your Honor.

11 THE COURT: Let's see what we can accomplish.

12 MR. KOBAK: Good morning, Your Honor. James Kobak,  
13 Hughes Hubbard & Reed, on behalf of Mr. Giddens, the SIPA  
14 trustee. Your Honor, I was going to give you a brief report on  
15 the status but, in light of the schedule, perhaps I'll postpone  
16 that until the next omnibus hearing on the 18th.

17 THE COURT: I think that'd be a shame. I'd like to  
18 hear the status.

19 MR. KOBAK: All right. Okay. All right, Your Honor.  
20 As Mr. Giddens, I believe, reported last time, the primary  
21 emphasis of our proceeding has been to transfer, where  
22 possible, property to customers. We've transferred now  
23 something like 130,000 accounts to Neuberger Berman and to  
24 Barclays. We're in the -- transferring the accounts is the  
25 easy part. Sometimes the property that goes with it takes a

1 little longer. We're in the process of cleaning that up now,  
2 and I think we've transferred something like 140 billion  
3 dollars of customer property.

4 We're in the process of transferring accounts of  
5 prime brokerage customers. That's proved to be a more  
6 complicated procedure, I think, than we envisioned, but we are  
7 in the process of doing it. We've devoted a lot of staff to  
8 that. We've beefed up that staff. We have a whole team of  
9 people from Deloitte as well as attorneys from my shop that are  
10 working on that. SIPC's made several people available. So  
11 that's proceeding.

12 Your Honor's going to hear from Mr. Wiltenburg in a  
13 few minutes about the order that we'd like you to enter to  
14 allow us to begin the claims process, and we expect that  
15 something in the area of as many as perhaps 800,000 claim forms  
16 may have to be mailed to customers and others. I don't think  
17 anyone has a good handle on exactly how many claims are likely  
18 to be submitted, but I think, under any estimate, it's going to  
19 be a very, very substantial number.

20 Mr. Miller referred to beefing up the staff and the  
21 Alvarez staff and so forth. You're going to be receiving some  
22 orders on some of these things, but the trustee has hired  
23 Marshall Levinson, who's an experienced financial person from  
24 Bear Stearns. We haven't been able to determine his exact  
25 title. We've been using the title "chief liquidating officer".

1 He's not so happy with that title, but he'll be the head of the  
2 operation. Deloitte has committed a large number of people,  
3 between forty and fifty people, and that number will probably  
4 grow some.

5 We're in the process of formalizing arrangements with  
6 former LBI personnel who, in some cases, we may hire directly.  
7 In other cases, they may now be working for Barclays or LBHI.  
8 And we may -- we'll enter some kind of arrangement with them to  
9 have them available to us and pay for it, etcetera.

10 And I guess the other thing I'll report is that we do  
11 have a website, but hearing Mr. Miller's comments, I think I'll  
12 go back, it's been a while since I've looked at it, and make  
13 sure that that's up to date because I think that's a good  
14 source of information for people.

15 So I think that concludes my report, unless Your  
16 Honor has questions that you'd like me to address.

17 THE COURT: No. I have no questions now.

18 MR. KOBAK: Good. Thank you, Your Honor. Your  
19 Honor, I thought, if I may, I was going to handle items numbers  
20 20 and 23. 20 is the disinterestedness application, and 23 are  
21 the procedures for interim compensation, which seem to me to be  
22 related. And, also, Mr. Wiltenburg was going to handle the  
23 remaining five or six things we have --

24 THE COURT: Fine. Go right ahead.

25 MR. KOBAK: -- if that's appropriate. So, Your

1 Honor, on number 20, disinterestedness, there's no objection to  
2 this motion. We filed an affidavit from the trustee and an  
3 affidavit from me on behalf of my firm basically saying that we  
4 believe we are disinterested in this under the standard in the  
5 SIPA statute. In paragraph 8 of my affidavit, I pointed to the  
6 only relationships, all of which were quite minor and really  
7 involved entities other than LBI that a few of my partners  
8 have. So in our view, there's no serious issue that we're not  
9 disinterested in this, and we'd ask Your Honor to approve that  
10 application.

11 THE COURT: I'm prepared to approve it. I just have  
12 a question about it, and this is just a procedural question.  
13 In the world of Chapter 11 cases, the U.S. Trustee would step  
14 in and examine assertions of disinterestedness. How does that  
15 actually work with SIPC? Who's the person who blesses your  
16 assertions, other than me?

17 MR. KOBAK: SIPC reviews that application, and  
18 Mr. Caputo is here in court today. I don't believe that SIPC  
19 has any problem with it, Your Honor.

20 THE COURT: Fine. I'll approve it.

21 MR. KOBAK: Thank you, Your Honor. The other motion  
22 that I handle is number 23, which are the procedures we suggest  
23 for interim compensation. And, again, there's no objection to  
24 this motion. Basically, what we propose, and this has been  
25 done in other SIPA cases, is that we would submit on a monthly

1 basis to SIPC, I think on the twentieth day of each month, an  
2 accounting of our time for the previous month, which they would  
3 review. And I can assure Your Honor from past experience that  
4 Mr. Caputo and his cohorts review these time entries very  
5 carefully and very painstakingly.

6 We would then be eligible to receive eighty percent  
7 of the amount on an interim basis, and there would be a formal  
8 fee application filed with the Court, which SIPC would also  
9 review and make a recommendation on, which would be filed  
10 between every 120 and every 150 days.

11 THE COURT: That's fine. It's entirely consistent  
12 with case management procedures governing monthly compensation  
13 that I'm familiar with in the Chapter 11 setting, and I approve  
14 it.

15 MR. KOBAK: Right. Thank you, Your Honor. And with  
16 that, I think I'll turn the floor over to Mr. Wiltenburg.

17 MR. WILTENBURG: Your Honor, I think I'm still able  
18 to say good morning.

19 THE COURT: Just barely.

20 MR. WILTENBURG: David Wiltenburg, Hughes Hubbard &  
21 Reed LLP, on behalf of James Giddens, Trustee for the  
22 liquidation of Lehman Brothers, Inc. As Mr. Kobak said, there  
23 are several other matters on the SIPA calendar today. They are  
24 all uncontested. Beginning with item 21, that was addressed in  
25 connection with the LBHI discussion, and it's subject to the

1 same stipulation that was discussed earlier this morning.

2 Number 22 is cash management, and that motion and the  
3 relief that's requested have undergone some changes since  
4 originally submitted. As it turned out, the idea of  
5 incorporating by reference the cash management order to be  
6 entered in the Holdings case was not practicable in that so  
7 many complications arose, mostly having to do with the fact  
8 that Holdings is an operating company and the fact that there  
9 are many affiliated entities, both debtors and nondebtors, that  
10 require treatment and a lot of provisions that are simply not  
11 relevant in the LBI liquidation.

12 So the order that we're submitting is a simple one,  
13 relatively speaking, that deals with bank accounts. And I'll  
14 defer to the affidavit of Mr. Lubell, who was not able to stay  
15 for the entire hearing this morning, to explain the other  
16 features. They include the fact that on a temporary basis LBI  
17 will continue to serve as, in effect, a paymaster for employees  
18 of other entities, and that's kind of an artifact of the cash  
19 management system that existed pre-petition, and it is  
20 remaining in place just for the sake of convenience for a short  
21 period of time while there's a transition. All of the payments  
22 that are going out under that scheme are being funded by LBHI  
23 or the relevant interested -- or Barclays or the relevant  
24 interested party.

25 Second, the motion seeks authority and nunc pro tunc



1 approval of payments to employees based on pre-petition wage  
2 obligations. And the way that came up, Your Honor, as it  
3 turned out, the 19th of September was a payday, and wages were  
4 due on that day. For the most part, the great bulk of them  
5 were actually made by electronic transfer to the filing that  
6 occurred on the afternoon of the 19th. What we're talking  
7 about here is sort of checks and kind of straggler check  
8 payments where the checks had not been deposited and honored by  
9 the time the automatic stay came down. And what we've done on  
10 that, and this is in the interest both of fairness to the  
11 employees and in the interest of the estate in maintaining the  
12 morale and goodwill of those employees who are of material  
13 assistance to us as we get familiar with a lot of issues, what  
14 happened is the trustee approved the funding of checks up to  
15 the amount of 10,000 dollars, and that was in deference, as I  
16 say, both to these fairness and morale issues and also to the  
17 statutory employee priority amount, which is somewhat in excess  
18 of 10,000 dollars.

19 THE COURT: 10,950.

20 MR. WILTENBURG: Correct. Your Honor, there are  
21 some, probably, stragglers still out there that have not  
22 presented the checks. As time goes on, that phenomenon will be  
23 less and less. But in response to a question of the creditors'  
24 committee in the Chapter 11 cases, I'm able to say that the  
25 maximum that will be paid out under the program that I'm

1 talking about now is less than 1.5 million dollars.

2 Your Honor, another feature of this cash management  
3 order is with respect to approximately 4.1 million dollars in  
4 employee deductions, and that was amounts for 401(k), for  
5 medical insurance, for other employee entitlements that were  
6 deducted from the employees' pay but not rendered over to --  
7 whether it's the 401(k) administrator or health insurance  
8 providers and so on, and this application seeks authority to  
9 turn over that amount to send that amount to where it should  
10 have gone. And I'm able to say, Your Honor, that we've taken  
11 account of comments, and the form of the order that was  
12 submitted on Monday is unopposed.

13 THE COURT: Does anyone else wish to comment on this?  
14 I approve it.

15 MR. WILTENBURG: Your Honor, item 24 is the trustee's  
16 application for entry of an order approving the form and manner  
17 of publication, mailing and notice of the commencement of the  
18 case. It also includes a claim form that is adapted for use in  
19 a SIPA proceeding. It has features that have been used in  
20 other SIPA liquidations and also features that are peculiar to  
21 the circumstances here. Pursuant to the SIPA statutory  
22 mandate, this notice will be mailed to all persons who can be  
23 identified from the debtors' books and records as potential  
24 customers or creditors. That number, as of today, is 906,760  
25 persons and entities. The notice will also be published in all

1 editions of The New York Times, The Wall Street Journal and The  
2 Financial Times. Again, there have been some changes since the  
3 order was initially submitted. There are changes to allow for  
4 electronic filing. There are changes to make clear that the  
5 forms should be completed only if the claimant has claimed  
6 against LBI and not against any of the other Lehman entities.  
7 Again, with changes based on comments, the request is  
8 unopposed.

9 THE COURT: I grant that relief as well.

10 MR. WILTENBURG: Item 25 is, in effect, a case  
11 management order that mirrors the provisions that have been put  
12 in place in the Chapter 11 cases. It deals with things like  
13 notices, timing, placement of matters on omnibus hearing days  
14 and the like. Again, the intent is to make procedures in the  
15 SIPA proceeding parallel to those in the Chapter 11 cases.  
16 And, again, there has been no objection.

17 THE COURT: Application granted.

18 MR. WILTENBURG: Item 26 is the trustee's motion for  
19 entry of an order approving the rejection of certain  
20 nonresidential real property leases. That motion is unopposed  
21 with a footnote that I need to cover. There was a motion by  
22 the landlord of certain premises at The World Financial Center  
23 seeking to compel assumption or rejection and also seeking  
24 allowance of an administrative priority claim. We've dealt  
25 with that one situation separately in a stipulation that I'm

1 able to hand up, if I may, this morning.

2 THE COURT: Are you interested counsel with respect  
3 to that stipulation?

4 MR. GOREN: Yes, Your Honor. Todd Goren, Morrison &  
5 Foerster, on behalf of Brookfield Properties, also known as WFP  
6 A Tower Co. We did work out an interim stipulation.  
7 Basically, we've agreed to modify the rejection date from the  
8 20th to the 31st, and then we will just be carrying our motion  
9 to the 18th. And we'll try and work out a more expansive  
10 stipulation with respect to the relief we request in that  
11 motion by that hearing.

12 THE COURT: All right.

13 MR. WILTENBURG: With that, Your Honor, may I hand up  
14 the stipulation?

15 THE COURT: Yes.

16 MR. WILTENBURG: Your Honor, also certain  
17 modifications have been made to the order to accommodate the  
18 items that are in that stipulation, and I can provide, after  
19 the hearing this morning, to chambers the amended form of order  
20 together with a copy that shows the changes to be made.

21 And with that, Your Honor, we would request approval  
22 of the trustee's motion for entry of the order approving  
23 rejection of nonresidential real property leases.

24 THE COURT: That motion is approved.

25 MR. WILTENBURG: Item 27 is the trustee's application

1 for an order extending the time within which the trustee may  
2 assume or reject executory contracts. That relief is  
3 appropriate for two reasons, Your Honor. One is that, pursuant  
4 to the sale order, Barclays had a period of 60 days from the  
5 closing to assume -- to designate contracts for assumption and  
6 assignment, and there will be a gap period between the 60 days  
7 that runs from the filing and the 60 days that runs from the  
8 closing of the transaction. So it's necessary, first of all,  
9 for that reason. And, secondly, it's necessary to provide  
10 further time to assess such contracts that are not assumed and  
11 assigned to make determinations as to the best interest of the  
12 LBI estate in such contracts as remain at that time. Again,  
13 Your Honor, we've received no objection.

14 THE COURT: That's granted as well.

15 MR. WILTENBURG: Thank you, Your Honor. Finally,  
16 there are a couple of matters that are being adjourned from  
17 today's calendar to the omnibus hearing on November 18th. One  
18 of them is the application of Meridian Corp. That's an  
19 adversary proceeding having to do with a claim for post-  
20 petition administrative expense that has been adjourned by  
21 agreement until November 18.

22 Second, the trustee's motion to approve expedited  
23 procedures for the sale or abandonment of de minimis assets --

24 THE COURT: Let me stop you on that one. I remember  
25 that we had an emergency hearing designed to facilitate a

1 closing of a Nomura transaction involving some assets in Asia.  
2 And during the course of that hearing, I raised some questions  
3 as to supplementing the record to make sure that the procedures  
4 for dealing with de minimis assets was one that was consistent  
5 and supported by appropriate diligence on the part of the  
6 trustee. Is there some reason why this is taking as much time  
7 as it is to come to the top of the list?

8 MR. WILTENBURG: Your Honor, it's a combination of  
9 things. It's a press of other business, for one, together with  
10 the fact that there hasn't, in the interim, been the need to  
11 make any disposition of assets.

12 THE COURT: I'm just interested in moving it forward  
13 because, curiously, this is something that would have been  
14 approved as an emergency item a while ago, and it's now in the  
15 category of being moved from hearing to hearing. And I'm just  
16 going to suggest to you that -- it's your motion, so you can do  
17 what you want with it, but it raises a couple of questions in  
18 my mind as to why I scheduled a hearing by order to show cause  
19 only to have the follow-up delayed as much as this one has been  
20 delayed. No criticism --

21 MR. WILTENBURG: Yes, Your Honor.

22 THE COURT: -- no criticism in my comment. It's just  
23 that it raised my curiosity.

24 MR. WILTENBURG: Indeed. Well, that exigent  
25 situation in Beijing was dealt with under the interim order

1 that Your Honor entered, and --

2 THE COURT: I understand --

3 MR. WILTENBURG: Yes.

4 THE COURT: -- but it was also true that, at the  
5 time, you were using the emergency as cause to approve these  
6 procedures. And when I raised some questions, it never came to  
7 my attention again.

8 MR. WILTENBURG: Your Honor --

9 THE COURT: I think it should come back to my  
10 attention promptly.

11 MR. WILTENBURG: Indeed, Your Honor, and it's our  
12 hope that we will tee it up properly for the --

13 THE COURT: Good.

14 MR. WILTENBURG: -- hearing on the 18th. The next  
15 item, Your Honor, is the Barclays Capital motion for relief  
16 concerning certain contracts erroneously posted with the  
17 closing date contracts. That's in parallel with the comments  
18 that Mr. Miller made being adjourned to the November 18th  
19 omnibus hearing date.

20 Item 46 is the motion of Newport Global Opportunities  
21 Fund. That's one of the 2004 applicants in LBHI. That, too,  
22 is being adjourned on consent to November 18.

23 And finally, Your Honor, item 47 is actually the  
24 matter on which we have just submitted the stipulation.

25 THE COURT: Fine.

1 MR. WILTENBURG: Thank you, Your Honor.

2 THE COURT: Thank you. Mr. Miller?

3 MR. MILLER: If Your Honor has one more minute.

4 THE COURT: I have more than --

5 MR. MILLER: Okay.

6 THE COURT: -- one more minute. I have multiple  
7 minutes for you.

8 MR. MILLER: Sir, you asked, I think, two hearings  
9 ago what was happening in connection with the cure amount --

10 THE COURT: Yes.

11 MR. MILLER: -- pursuant to the asset purchase  
12 agreement, what activities and what progress was being made by  
13 Barclays in connection with that. Did you want to take that?

14 MS. SCHWEITZER: Yeah. Sure. Good afternoon, Your  
15 Honor. Lisa Schweitzer from Cleary Gottlieb for Barclays  
16 Capital. I wanted you to know and be able to report that I  
17 think at the last hearing we had said we were making progress.  
18 Barclays is, in fact, making substantial progress in resolving  
19 cure objections. Just so you know that today we haven't  
20 been -- we've been prioritizing resolving objections rather  
21 than cleaning up the docket, and we are working on the best way  
22 of doing some sort of omnibus notice of which objections are  
23 being withdrawn, solely because it's a manpower exercise at  
24 this point, and counterparties want their money more than they  
25 want to file withdrawals of their objections. So the docket



1 will chase the substance.

2 But on the substance, as people have indicated that  
3 the right to assign contracts over has a 60-day window that  
4 closes November 21st so that there will probably be more  
5 contracts noticed. But, to date, about 3,500 contracts have  
6 been noticed. An additional several hundred financial service  
7 agreements have been noticed for assignment. And then there  
8 have been some, for lack of a better word, bulk notices of  
9 license agreements and the like where it's relatively  
10 noncontroversial, but they're voluminous.

11 Of the objections that have been filed, we've been  
12 tracking them by contract rather than counterparties, and we've  
13 resolved about a third of the objections measured on a contract  
14 basis. And of the remaining objections that each -- there's  
15 about one objector to each three contracts that are  
16 outstanding. So we have knocked out a third of the objections  
17 formally or informally asserted to date, and that's about a  
18 three, four-week period, and we expect to make substantial  
19 progress throughout November.

20 We haven't really hit an impasse with any significant  
21 number of creditors such that we want to, at this point,  
22 propose an ADR procedure. We recognize that we don't want to  
23 inundate this Court with objections, as a first instance, and  
24 we've heard your guidance on that. But at this point, things  
25 are still moving relatively well --

1 THE COURT: Good.

2 MS. SCHWEITZER: -- that we don't want to propose  
3 anything until we see how it shakes out. But we thought you'd  
4 appreciate the update.

5 THE COURT: Thanks for that update.

6 MS. SCHWEITZER: Sure.

7 MR. MILLER: The debtors have nothing further, Your  
8 Honor.

9 THE COURT: Mr. Miller, just one pure housekeeping  
10 item. We need to establish omnibus hearing dates for the  
11 period after December, and, incredibly, we've moved to that  
12 point in the year when December is next month. So I would  
13 suggest that, in consultation with the creditors' committee and  
14 counsel for the trustee in the SIPA proceeding and other  
15 interested parties, that you come up with hearing dates for  
16 January, February, March and so on --

17 MR. MILLER: Yes, sir. We'll do that.

18 THE COURT: -- and work out some arrangement to  
19 confer with chambers so that we can identify those dates as  
20 dates that are good for me and then at least be able to give  
21 everybody some order to their schedule going into 2009.

22 MR. MILLER: We will undertake to do that, Your  
23 Honor.

24 THE COURT: Okay.

25 MR. MILLER: Thank you.

1 THE COURT: Thank you very much. And we will resume  
2 at 4:00.

3 (Recess from 12:18 p.m. until 4:00 p.m.)

4 THE COURT: Be seated, please. Mr. Grillo, I think  
5 this is your motion so --

6 MR. BRILLO: Yes.

7 THE COURT: -- why don't you proceed?

8 MR. BRILLO: Sure. Thank you. Good afternoon, Your  
9 Honor. For the record, Emanuel Grillo of the law firm Goodwin  
10 Proctor here on behalf of Evergreen Solar Inc. which is the  
11 movants with respect to the preliminary injunction before the  
12 Court. Just by way of introductions, with me in the courtroom  
13 today is my partner, Brian Hale. With us in the courtroom from  
14 our client, Evergreen Solar, is Michael El-Hillow, who is the  
15 CFO of the company along with Christian Abar. It's anticipated  
16 that Mr. El-Hillow will testify in support of the application.

17 In the first instance, Your Honor, we'd like to thank  
18 the Court for its time this afternoon and for putting us on at  
19 the end of the day. We realize it's been a long day. We'll do  
20 our best to get through these matters expeditiously for  
21 everyone's benefit understanding that it's been a long day for  
22 everyone else already. We're acutely aware of that.

23 We're also acutely aware of the complex and  
24 unprecedented nature of the transactions involving the Lehman  
25 bankruptcy. From Evergreen's perspective, what we have tried

1 to do is try and limit and circumscribe what it was that we  
2 were dealing and focusing on the relief that was really  
3 required and came at this separate time to the Court as opposed  
4 to in connection with the sale hearing because we felt that a  
5 lot of these things would play out over a period of time. When  
6 we became aware of where the shares were, at that point, we  
7 first reached out to counsel on both sides and then came to  
8 this court when there was no immediate agreement to try and ask  
9 for relief. So within that context, we present this  
10 application.

11 THE COURT: Let me ask you a preliminary question  
12 that may be out of sequence but --

13 MR. BRILLO: Certainly.

14 THE COURT: -- it's just something I want to know  
15 about. Assuming purely for the sake of argument that at the  
16 end of this process you persuade me that some kind of  
17 injunctive relief is appropriate here.

18 MR. BRILLO: Yes.

19 THE COURT: Is your client in a position to post a  
20 bond? And, if so, has there been any consideration of the  
21 amount of the bond that would be appropriate under the  
22 circumstances?

23 MR. BRILLO: I can address that question, Your Honor.  
24 And we've given that question a great deal of consideration  
25 especially in the current financing market. We've reached out

1 to try and look into what it would take to post a bond. Like  
2 everything else, and perhaps indicative of why we're all here,  
3 it's not so easy in the first instance. But we thought about  
4 approaching that with a measure of both equity and creativity  
5 and we developed a proposal that we would like to share with  
6 Your Honor and the other parties in that regard.

7 THE COURT: Is this the first time that the other  
8 side will be hearing this proposal?

9 MR. BRILLO: It is, Your Honor. It is because we did  
10 it last night and this morning. In terms -- we knew we would  
11 get the question from the Court and we wanted to be able to  
12 come with a proposal as far as that goes.

13 THE COURT: What's your proposal? Because if your  
14 unable to bond is consistent with the requirements of the rule,  
15 I'm just not sure where we're going with this. So I wanted to  
16 deal with it as a threshold question.

17 MR. BRILLO: Understood, Your Honor. And depending  
18 on how it comes out, we're still looking at the possibility of  
19 bonding it. But here's what we thought. In connection with  
20 the agreement that's the subject of this proceeding, the share  
21 lending agreement, what I think you'll find when you hear the  
22 testimony is that Lehman was given the first round of shares.  
23 It was a total patch of thirty million shares, eighteen million  
24 of which were sold by Lehman into the marketplace, okay, for  
25 which the company received no consideration because Lehman only

1 had the obligation at the end to deliver the shares back.

2           Lehman sold those into the marketplace for  
3 approximately 9.50 a share so which comes to in excess of 166  
4 million dollars. What we thought made sense is instead of  
5 having essentially Evergreen pay twice that, effectively, what  
6 we'd do, and this is why I said a measure of equity and  
7 creativity, is, effectively, take it as a recoupment, okay,  
8 against that claim. So, essentially, if you look at what we  
9 are proposing to do and what we need back from the shares along  
10 with our original claim in this matter, what we would suggest  
11 then is offsetting the bonds -- two things. One is that we  
12 just don't know what, in fact -- and what's absent from what  
13 Barclays submitted -- is what they paid for the shares, in the  
14 first instance. So we don't really know what, if anything,  
15 Barclays is out. We know what the market value of the shares  
16 is but it's our contention that Barclays didn't even know what  
17 they were getting or what they were paying for it, number one.  
18 So we don't know how much they're out of pocket. But, two,  
19 that Lehman, in fact, benefited under this contract and under  
20 the theory of recoupment because it's all part of the same  
21 transaction. There is no doubt, I think, and the testimony  
22 will establish, that Lehman did, in fact, sell the shares into  
23 the marketplace, the first eighteen million at an approximate  
24 price of 9.50 a share which is 166 million dollars. So what  
25 we'd like to do, for purposes of the bond, is, essentially, put

1 up the claim on a recoupment basis for that -- up to 166  
2 million which, if you take the twelve million shares at the  
3 approximate trading price presently of six dollars a share,  
4 comes up to seventy-two million dollars. And therefore, we're  
5 still well within the amounts that were sold into the case as  
6 part of the problem.

7 The flip side of it is is that it is extremely  
8 difficult, one, to post a bond, to post a bond for seventy-five  
9 million, and to do it after, in fact, we had put these thirty  
10 million shares into the marketplace with no consideration.  
11 Part of our position, obviously, is understanding what kind of  
12 a company Evergreen is, where it fits into the marketplace,  
13 what its cash needs are and what it's doing. Coming up with a  
14 bond or the equivalent for seventy-two million dollars, if that  
15 was what the Court was to require, would be extremely difficult  
16 especially in view of the fact that we don't know how much was  
17 paid as part of the price. So that would be our proposal in  
18 respect of a bond.

19 THE COURT: Okay. Well, I don't want to get the cart  
20 before the horse because, based on the papers that have been  
21 filed in opposition to your motion, there are a host of  
22 arguments that you're not entitled to injunctive relief under  
23 any circumstances because of a failure to show irreparable  
24 harm. But that's what this hearing is about.

25 MR. BRILLO:

1 THE COURT: I'll just comment, and I don't mean to  
2 preempt anybody's arguments in reference to what you've said,  
3 that my notion of what's required in order to bond this is  
4 something to compensate Barclays for the consequences of the  
5 liquidity because the ultimate penalty that Barclays as  
6 purchaser of the shares -- and let's not get into the question  
7 of what they paid for them. They currently hold, pursuant to  
8 the sale order, the shares and they are in a position to sell  
9 them absent the injunction. If an injunction is issued, they  
10 will suffer the liquidity in respect of those shares for the  
11 duration of the injunction. I view that as the principal issue  
12 that needs to be addressed. And I don't know how your  
13 recoupment claim concept deals with that.

14 MR. BRILLO: Well --

15 THE COURT: But we don't need to spend a lot of time  
16 at the preliminary levels addressing this. I simply wanted you  
17 to know -- and, frankly, the litigants may not see it the way I  
18 just articulated it. But from my perspective, as I was  
19 analyzing this, I view the consequence of an injunction that  
20 prevents a third party from selling marketable securities to be  
21 compensation for the liquidity discount and risk associated  
22 with market movement. And I believe that there needs to be  
23 fair compensation for that. I'm just telling you that's how I  
24 see it. And I'm not preempting any arguments that anybody  
25 might make as to the bond.



1 MR. BRILLO: I understand that. And can I just make  
2 one point in response and then maybe we can move on. My point  
3 in response would be is that to the extent that there is an  
4 issue, we think the issue is between Barclays and Lehman,  
5 frankly, in the sense that Barclays bought something from  
6 Lehman. Lehman made certain representations with respect to  
7 it. The easier thing to do, I think, is to take from the  
8 transaction that was approved by the Court an appropriate  
9 reserve against the purchase price and we could say, well,  
10 look, here are the shares. Here's what was paid for them. We  
11 put it all in a pile to protect against that risk because it  
12 doesn't seem to me that -- you know, if we were to win, it  
13 meant that Lehman didn't have title to the shares. If we were  
14 to lose, we still ultimately have a claim against Lehman in  
15 connection with the breach of the agreement, all of which ties  
16 into my recoupment theory in the sense that it's -- whether  
17 it's pre or post-petition, it all works out as part of the same  
18 transaction. There should be a way to net those numbers  
19 between Lehman, Barclays and Evergreen so that we can  
20 accomplish that, give people protection, effectively, pull it  
21 out of the transaction so Barclays doesn't bear any risk. It's  
22 really Lehman, frankly, who should bear the risk of the three  
23 parties in our view because they're the ones who don't --

24 THE COURT: Well, we're not going to rewrite  
25 Bankruptcy Rule 7065 today. There are bonding requirements

1 that are incorporated into that rule. If parties agree to the  
2 bond, that's one thing. If parties are asking me what my  
3 ruling's going to be, I'm telling you now I'm going to, if  
4 there isn't another agreement, insist on a bond that's a real  
5 bond --

6 MR. BRILLO: Okay.

7 THE COURT: -- not one that's crafted out of a  
8 recoupment claim because I view the party who's most directly  
9 affected by the relief that you seek to be Barclays as holder  
10 of those shares. Now, they can speak for themselves. I'm just  
11 letting you know how I see it having studied the papers.

12 MR. BRILLO: We understand that, Your Honor. Perhaps  
13 what we should do at this point is perhaps move into the merits  
14 of the application.

15 THE COURT: What I think we should do is have an  
16 opening from your side on the legal issues --

17 MR. BRILLO: That's --

18 THE COURT: -- an opening from the defendants on the  
19 legal issues and then get into the merits.

20 MR. BRILLO: That's what -- I'm sorry. That's what I  
21 was proposing to do as well.

22 THE COURT: Go right ahead.

23 MR. BRILLO: Okay. Your Honor, very simply, just by  
24 way of background, Evergreen Solar Inc. is a power technology  
25 manufacturing company. It's a growth company. It's not an old

1 mine manufacturer. And for these reasons, the needs of the  
2 shares and the shareholders are of greater concern than, for  
3 example, the IBMs of the world.

4           Evergreen, in order to accomplish any transaction to  
5 accomplish its mission of building out the solar plant, for  
6 example, that's presently under construction, in Devins,  
7 Massachusetts, and further expansion, as we said in our reply  
8 papers, the shares are a critical element of that process.  
9 It's this company's currency. It's its lifeblood. The company  
10 does not, at present, have a steady stream of operating income  
11 as would be traditional for older manufacturers or a typical  
12 sort of operating company. And that's why when we talk about  
13 what the irreparable harm would be if we don't have control  
14 over those shares. The impact on Evergreen can't be overstated  
15 by the distribution of those shares into the marketplace. Why?  
16 Because it's a controlled shareholder position. It's seven  
17 percent -- twelve million shares represent seven percent of our  
18 outstanding shares. It makes it extremely difficult for  
19 getting shareholder approval for strategic transactions, for  
20 financing transaction. It gives them a significant say over  
21 the affairs of the company. And any next trip to the  
22 marketplace, some of which are being contemplated now, will  
23 depend on getting that shareholder approval.

24           Now, the argument may be well, Lehman held those  
25 shares, too, and if Lehman were holding those shares, what

1 would be the difference between Lehman and Barclays. And  
2 there's a material difference, Your Honor, quite simply because  
3 under Section 7 of the share lending agreement, the two issues  
4 of beneficial ownership or the two traditional indicia of  
5 beneficial ownership as opposed to mere record ownership, which  
6 is all that was granted under the SLA are the right to  
7 dividends, which, under the agreement, has to be paid back  
8 under Section 6(a). So they didn't have -- Lehman, when they  
9 had possession of the shares, didn't have the right to  
10 dividends. But more importantly, for the matters that I just  
11 addressed, it's the right to vote the shares. Expressly carved  
12 out from the rights granted to Lehman -- and this is why it's  
13 our position that, in fact, title wasn't transferred was that  
14 the shares, while they were in Lehman's possession were not  
15 entitled to exercise their rights to vote. And because of the  
16 position that the company is in and because it needs to go back  
17 to the marketplace, having someone holding that significant a  
18 block is a material risk factor for the company. In fact,  
19 there's one other significant holder who is a strategic holder  
20 which we've disclosed in our -- all of our public filings. And  
21 there are risk factors associated with that. It gives that  
22 party, to the extent that they have an interest in the company,  
23 a material say over what occurs and what doesn't occur. The  
24 one thing is that at least those parties have paid for those  
25 shares. No one has paid the company for these shares that are

1 issued at present. And as a result, there is a material and  
2 real and imminent impact having those shares out in the  
3 marketplace as they have not been paid for on the company.

4 What we said originally in the opening remarks in  
5 respect of the bonds that I just wanted to go over is that the  
6 original transaction, the original share lending agreement was  
7 for thirty million shares. And eighteen million of those  
8 shares were sold into the marketplace. And Lehman retained the  
9 proceeds of that sale which is in excess of 166 million  
10 dollars.

11 The critical question for the Court in our view is  
12 the interpretation of Section 7 of the share lending agreement  
13 which granted to Lehman for the shares that were in its  
14 possession certain incidents of ownership, not beneficial  
15 ownership, not the right to vote and not the benefit of the  
16 dividends, if any, that are paid on the shares.

17 When Lehman got into trouble and ultimately found  
18 itself before Your Honor and before this Court, Evergreen acted  
19 quickly to try and figure out what was out there. When Mr. El-  
20 Hillow testifies, I think he's going to say -- he'll tell you a  
21 couple of things. And these documents have been attached to  
22 the pleadings and we have a binder for Your Honor to follow the  
23 testimony. But letters were sent by Mr. El-Hillow to Lehman on  
24 both the 15th and the 17th of September exercising the remedies  
25 to terminate the share lending agreement immediately. The

1 share lending agreement is written so that it's drafted as a  
2 swap agreement and therefore entitled to the benefits of the  
3 safe harbor provisions of the Bankruptcy Code. Things moved  
4 quickly, we understand, and the sales process was approved.  
5 When he's called to testify, Mr. El-Hillow will say no one from  
6 Lehman reached out to him. No one responded to the letters  
7 that were sent with respect to the shares. In fact, when  
8 asked, Lehman didn't even say that they had the shares in their  
9 possession. We were dealing both with Lehman here in the U.S.  
10 and also trying to deal with the administrators that were  
11 appointed in the U.K. In fact, from the initial inquiries that  
12 were made on the 15th, there was a response just received last  
13 week, some six weeks after the case was filed and also some --  
14 I guess, five weeks after the sale was approved.

15 Again, Evergreen is understanding of what that means  
16 and where it fits into the scheme of things and what these  
17 twelve million shares are within the universe of this  
18 transaction. However, what it doesn't want to be the subject  
19 of or the victim of is collateral damage caused by this process  
20 when it needs those shares in order to be able to go to the  
21 marketplace, carry out its business, keep its people employed.  
22 On that basis, we think there is a real and irreparable harm  
23 caused by this.

24 With respect to the last elements, the balance of the  
25 hardships, we think the balance of the hardships is actually a

1 somewhat easy argument for the points that I made. To the  
2 extent that Lehman represented that it had good title to those  
3 shares then, effectively, all we need to do is to pull them out  
4 of the transaction and pull what the cash consideration paid  
5 for them, whatever it is because it's not been disclosed at  
6 this point, and put that all to the side. And this way,  
7 Barclays doesn't bear a risk that it completed a transaction  
8 that if the price moves against them or they wanted to sell or  
9 that Evergreen doesn't bear a risk should they come out at the  
10 end of the day and have the shares issued. The problem is is  
11 that there's a difference in the shares being issued pursuant  
12 to a share lending agreement versus them being sold in the  
13 marketplace. And that is this. While they're issued for  
14 corporate purposes, the shares are ultimately not deemed issued  
15 for accounting purposes under U.S. GAP rules. And by putting  
16 those shares back into the marketplace, as Barclays is  
17 proposing to do, or at least claims that it has the right to do  
18 under the 13(g) that was filed on October 8th with respect to  
19 the shares which was the first time that they learned about --  
20 actually that Evergreen learned about it, that with the rights  
21 that it asserted there, it undermines the company's accounting.  
22 It undermines the value of its existing shares. And it  
23 undermines its ability to go back into the marketplace.

24 For Barclays and Lehman and their respective  
25 constituencies, I think the balance of harms is no where near

1 that because, simply put, they can just pull that element out  
2 of the transaction and close around it.

3 It wasn't until the pleadings were filed, in fact, or  
4 until the 13(g) was filed that Evergreen had any notice that  
5 its shares were even sold. As I indicated, on 9/15 and 9/17  
6 when we inquired as to Lehman as to where it was, we didn't  
7 receive any response. There was no response or not indication  
8 post-sale that they were included as part of the assets. And  
9 in the original that was presented to this Court, there was no  
10 indication that shares that were subject to these types of  
11 agreements would be sold, which we think violates our due  
12 process rights. We understand that there were a whole lot of  
13 things going on. We hope that the Court then takes an open  
14 mind with respect to the position that we're in and the issues  
15 that it presents.

16 And so, for these reasons, Your Honor, I think we  
17 have come to this Court for a preliminary injunction asking the  
18 shares to be withheld from dissemination into the marketplace  
19 so that this way we can sort out these title issues and move  
20 forward and figure out the adversary proceeding, where that  
21 takes us and ultimately to satisfy that last element.

22 We talked about the injunction. The only other thing  
23 I would note is that with respect to the claims that Article 8-  
24 105(a) applies, we note, and we noted in our papers, that  
25 clause 2 of 105 of Article 8, Section 105(a), does say that you



1 can't exercise deliberate abandon with respect to a purchase of  
2 shares. We suggest to Your Honor that this transaction is  
3 unprecedented, is done on such short order that there had to be  
4 some sort of a duty on behalf of the buyer knowing that it was  
5 buying these securities from an insolvent entity. The cases  
6 under that provision of the UCC do not really address any  
7 situation like this. Perhaps, knock wood, they don't happen  
8 every day, but we think that the case law where there is no  
9 duty to investigate is in apposite to the circumstances of this  
10 case. That's not to say that Barclays shouldn't be protected.  
11 It's only to say we can pull this out of that transaction, move  
12 forward, determine whether the shares are rightfully ours, as  
13 we believe, or if they belong to Barclays and there isn't a  
14 market risk associated if they pull it out of the transaction.

15 THE COURT: Okay. In order to grant you the relief  
16 that you seek, do I need to make any preliminary determination  
17 as to the rights that you assert under the SLA or the argument  
18 made by Barclays that the SLA an irrelevant aside, because  
19 these shares were, in fact, transferred pursuant a REPO  
20 transaction that was entered into on September 18. And as part  
21 of the sale transaction it was the validation of the REPO  
22 purchase that, at least as I understand it, affected the sale.  
23 I can't tell -- and I'm letting you know that I'm having a  
24 problem with it, the degree to which the SLA is simply a red  
25 herring. And the degree to which all of this is really not

1 about the merits of your case, but rather your ability to  
2 demonstrate immediate and irreparable harm and bond the  
3 illiquidity that would result from tying up those shares.  
4 Because in the end, I'm just letting you know this, I think it,  
5 both inefficient and unwise, for me to be forced today to make  
6 any judgments that go to the merits of your underlying  
7 adversary proceeding, other than to determine that you've made  
8 some claims that are subject to good faith litigation.

9 I think in the end your burden is going to be to  
10 prove up irreparable harm. And if you succeed in that, to  
11 demonstrate that you have the capacity to bond the risk.

12 MR. GRILLO: Okay. I'm not exactly clear what the  
13 question was. But as --

14 THE COURT: It was just a comment from me.

15 MR. GRILLO: Okay.

16 THE COURT: It's just letting you know how I'm  
17 viewing this.

18 MR. GRILLO: Understood.

19 THE COURT: So when you make all kinds of comments  
20 about this being unprecedented, sure, there are aspects of the  
21 Lehman case that are unprecedented, but what you're seeking  
22 today is entirely conventional. You're seeking a preliminary  
23 injunction and the case law that I have to apply is well known  
24 by everybody in the courtroom. And you either succeed or fail  
25 in demonstrating principally the irreparable harm standard.

1 And if you succeed as to that standard, you're still going to  
2 be subjected to a bonding requirement. I'm just letting you  
3 know that loud and clear.

4 MR. GRILLO: Understood. Understood. Well, at this  
5 point I'll turn -- I understand your comments, I don't think  
6 you were asking me --

7 THE COURT: My comment was to say this is not so  
8 unprecedented. And I'll hear what the defendants have to say.

9 MR. GRILLO: Right. If I could just make one last  
10 point before I yield the podium, Your Honor.

11 With respect to tying these issues together, I think  
12 they're inextricably tied to the asset sale because, again,  
13 what we've said is that our client did not have notice that  
14 this was part of the sale. We reached out to Lehman before the  
15 sale, after the case was filed. And we think that from the  
16 sale perspective, and this is kind of what ties the whole thing  
17 together from our perspective, is that there was no way in that  
18 context to respond. And what I also note is that even in the  
19 clarification letter to the sale order or to the agreement,  
20 there is a window of time within which we are in for purposes  
21 of clearing what is and what isn't a purchase asset at this  
22 point. There's no evidence in the record, other than the fact  
23 that there is an affidavit saying everything that was on  
24 Lehman's books was dumped into the REPO. And the problem that  
25 my client has from that perspective is there's no way to kind

1 of -- we can't separate those issues. We understand what Your  
2 Honor is saying in terms of what's conventional. What's not  
3 convention from my client's perspective, respectfully, is  
4 having the property sold without a chance to do it. And then  
5 sort of say well, this was all one event as far as my client  
6 was concerned. And I know that's not what the Court may view  
7 it but that's certainly, you know, the due process issue that  
8 we have with the way the sale from our perspective, based on  
9 the disclosures that were made by the debtors, you know, in  
10 connection with the sale.

11 And with that, I'll yield the podium.

12 THE COURT: Okay.

13 MR. MORAG: Good afternoon, Your Honor. Boaz Morag  
14 of Cleary, Gottlieb, Steen & Hamilton for Barclays Capital Inc.

15 I should just say at the outset that this morning we  
16 were advised that Barclays PLC, another defendant in this  
17 action, and a party against whom the injunction has been  
18 requested, was served with process in London. And I've been  
19 authorized to simply state that Barclays PLC adopts the  
20 arguments made by Barclays Capital Inc. for purposes of this  
21 hearing.

22 THE COURT: When you say Barclays PLC was served with  
23 process, do you mean that they were served with process with  
24 respect to the preliminary injunction motion that we're hearing  
25 now? Or is it something else?

1 MR. MORAG: I believe -- I believe it was the  
2 complaint and the motion papers. But they certainly are aware  
3 of the application and just wish that --

4 THE COURT: Are you speaking on their behalf?

5 MR. MORAG: Yes.

6 THE COURT: Okay.

7 MR. MORAG: Your Honor, we certainly concur that  
8 there has to be a showing of irreparable harm before you ever  
9 get into the question of the propriety of the injunction and  
10 then the separate issue of the bonding. With respect to  
11 irreparable harm, I think it would be perhaps useful to focus  
12 on the precise legal standard that the Second Circuit has  
13 articulated for that harm. And we are talking about an injury  
14 that is not remote or speculative, but actual and imminent.  
15 And we're also talking about an injury for monetary reward  
16 cannot be adequate compensation either -- only where -- and  
17 that occurs really only where you're either dealing with truly  
18 unique property which we are not here, or with matters that are  
19 incalculable. And, again, that is not the issue here.

20 As Your Honor indicated, just calculating the  
21 appropriate bond would essentially tell you where the damages  
22 could possibly be in this case. I don't think that whatever  
23 Mr. Grillo has articulated as harm, which is actually only a  
24 small subset of what's in the papers that we've seen so far,  
25 qualifies under that demanding Second Circuit standard.

1 I want to address a couple of points with respect to  
2 the difference between loan shares and other shares in the  
3 market. And a point was made that Lehman didn't have a right  
4 to vote the shares. And when you say Lehman in this case it  
5 means LBIE, Lehman Brothers International Europe, the borrower,  
6 and any affiliates of Lehman. That is made clear in the share  
7 lending agreement. But once the shares are transferred outside  
8 of affiliates of Lehman, they certainly do have the voting  
9 rights. So the eighteen million shares that are in the market  
10 are subject to voting rights. They are also subject to  
11 receiving dividends at this point. Evergreen Solar has a  
12 contractual commitment from Lehman Brothers International Inc.  
13 to refund those dividends to Evergreen Solar. But there is no  
14 question that the owners of those shares can't be excluded by  
15 Evergreen from the issuance of dividends or distributions. So  
16 those differences between the borrowed shares and shares in the  
17 market don't exist.

18 And the other thing, Your Honor, I think we should  
19 focus on is that it was always -- had to have been the  
20 contemplation of these parties that Lehman Brothers  
21 International Europe as the borrower would go out and buy  
22 shares in the market when this transaction was done. Whether  
23 it was done by expiration in 2013, whether it was done by  
24 Lehman having the unilateral right to terminate the transaction  
25 whenever it wanted, or whether it was done by an even of

1 default. And there could have been events of default that  
2 don't affect bankruptcy or don't result in bankruptcy. So we  
3 know that eighteen million shares were distributed at the very  
4 outset. And, indeed, Evergreen's own papers disclose that they  
5 knew that that would happen because those eighteen million  
6 shares of the thirty million were intended to be in some ways  
7 supportive of the hedging effort that this whole somewhat  
8 complex arrangement is there to support. The idea being that  
9 Evergreen would raise more money, have a better offering of --  
10 if they offered convertible debt with this share lending  
11 agreement in place as well. It was a package. And there was  
12 also this -- something called a call spread, which Lehman in  
13 its investment banking opinion thought also would enhance the  
14 value of this offering to the market and raise more money for  
15 Evergreen.

16 So the point being, Your Honor, that there was always  
17 an expectation that holders in the market, anonymous holders in  
18 the market would hold, if not eighteen million, perhaps all  
19 thirty million shares. So when the music stopped and when the  
20 dance ended it was always to be the case that Lehman Brothers  
21 International Europe would have to go out in the market to  
22 fulfill its contractual obligations and find thirty million  
23 shares of Evergreen common stock, all of which bears the same  
24 KESP and is otherwise indistinguishable, these are registered  
25 shares. And tender them back to Evergreen.

1           So this notion that we couldn't do that -- we  
2       Barclays Capital somehow can't do that as a matter of -- the  
3       Court should just take Evergreen at its word that these shares  
4       are not obtainable and there can be no replacement of them, is  
5       simply false. I mean, if Lehman can do it at thirty million we  
6       can do it at twelve million.

7           THE COURT: Let me ask you a question about the share  
8       lending agreement. Is it Barclays' position that it holds  
9       these shares pursuant to the terms of the share lending  
10      agreement? Or that it just holds these shares free and clear  
11      pursuant to the sale order and is now free to do whatever it  
12      wants with the shares. Because I think those are very  
13      different consequences. If it's the former then everything  
14      that you said applies, in terms of the expectations of the  
15      parties. Because there the shares are being held to cover  
16      presumably the shorting requirements of those who are buying  
17      convertible bonds and maybe looking for a shorting strategy to  
18      cover some of the exposure to the market on conversion. I'm  
19      assuming that's why this arrangement was set up. If it's not  
20      somebody can explain that to me later.

21           But now what you're talking about is, in effect,  
22      stripping these shares from the cover of the original  
23      underwriting arrangements and having the ability to simply sell  
24      them into the market. Is it Barclays' position that you can  
25      just do that whenever you want to and, in effect, pocket the



1 money?

2 MR. MORAG: Your Honor, essentially, yes. Barclays  
3 did not assume the share lending agreement. It purchased the  
4 shares through the REPO. That was ratified and confirmed  
5 through the sale order. And it filed a Schedule 13-G statement  
6 indicating its ownership. Its indicated that it's holding  
7 these for investment with no intention to affect the management  
8 or control of Evergreen.

9 THE COURT: If you're prepared to hold it for  
10 investment without any interest in effecting control, is there  
11 any reason that you can't agree now that for the duration of  
12 the litigation until such time as you give notice, you'll hold  
13 the shares and this matter can be disposed of without having to  
14 go through all of the time and trouble that we're going through  
15 this afternoon?

16 MR. MORAG: Your Honor, as logical and appealing as  
17 that suggestion is, the problem is --

18 THE COURT: Thank you, you didn't have to say that.

19 MR. MORAG: Well, I'm a former law clerk and one of  
20 the things we were supposed to do was come up with solutions  
21 like that. The problem however is, then that would mean that  
22 Barclays would bear all the market risk. These shares have  
23 gone up, they've gone down.

24 THE COURT: Yes, but didn't you just tell me that the  
25 13G that was filed effectively assumed the market risk by

1 saying that it was the intention of Barclays, as holder, to  
2 simply hold on to the shares?

3 MR. MORAG: No, that is the present intention and  
4 it's most important on what we are not planning to do with it.  
5 But the 13G would not require, if Barclays saw an opportunity  
6 to sell some shares into the market, it would not prohibit that  
7 or restrict that in any way.

8 I am, just to be clear, not an expert on 13G law.  
9 There is some point at which, if Barclays were to reduce below  
10 the threshold, it's now below five percent there may be a  
11 reporting event there and the whole world would know it. But  
12 the point is, simply, that Barclays purchased these shares.  
13 There simply is no obligation on a purchaser of securities to  
14 do any kind of the diligence or to check the pedigree and  
15 provenance of shares that are subject to a standard repo  
16 transaction, which is what you would essentially have to find  
17 in order to determine that they have a likelihood of success on  
18 the merits of their claim.

19 Because without that the UCC defenses are fairly  
20 clear. And I can get into that because I think while  
21 Mr. Grillo addressed the willful blindness standard he didn't  
22 articulate what it actually says in the UCC commentary.

23 But the point is that we have still not heard why  
24 these shares are any different from twelve million shares  
25 Evergreen could issue tomorrow and if it is correct vis-a-vis

1 Barclays that he could recover subsequently covered damages or  
2 replacement shares. When these shares go back -- if shares go  
3 back to Evergreen as an issuer, they do not remain registered  
4 shares.

5 The 33, I think, is clear that the registration  
6 applies to the transaction, not to specific shares. So they  
7 would get shares that they couldn't issue unless they  
8 registered them or did a private placement. The shares they  
9 could issue tomorrow are shares that they could register or do  
10 a private placement. There is nothing unique about these  
11 particular ones.

12 Now, with respect to -- if I could just address some  
13 other things that were said with respect to affect on earnings  
14 per share calculations and so on.

15 The fact of the matter is that according to the  
16 complaint the company has already had to reflect the fact that  
17 there is no certainty that these shares are coming back. As I  
18 understand it, the accounting treatment of loan shares under  
19 GAP is premised on the understanding and expectation that the  
20 loan shares will come back at the end of the term. That  
21 expectation has been upset, not by anything Barclays has done,  
22 but by the events regarding Lehman.

23 So the earnings per share affect has happened. There  
24 is no suggestion that a preliminary injunction for the few  
25 weeks until we can litigate the merits of this whole thing

1 would change the earnings per share and if they lose they're  
2 going to have to change it back again. The point is the  
3 injunction will not address harm they claim to have already  
4 suffered. So that's a fact that Your Honor has to, I think,  
5 take into consideration in deciding whether this relief is  
6 going to stop either an ongoing harm or a future imminent clear  
7 harm.

8 THE COURT: I was hearing something else, though. I  
9 was hearing Mr. Grillo say, among other things, that because  
10 the shares represent something in excess of seven percent of  
11 the shares of a relatively young company in terms of the  
12 capital markets, that there is a risk to corporate governance  
13 and the company's ability in a volatile financing market to  
14 obtain additional financing and capitalization for their  
15 anticipated growth and development of their business,  
16 particularly in their new plan in Massachusetts. So his  
17 argument, I think and I'm not putting words in his mouth, is  
18 that it's less about what you just described and more about  
19 future harm to the enterprise.

20 MR. MORAG: Your Honor, I hear the words. I heard  
21 them when Mr. Grillo said them and we have not yet seen any  
22 evidence.

23 THE COURT: We're about to get into that. We're just  
24 having a little preliminary conversation.

25 MR. MORAG: Your Honor, I would be very surprised if

1 an expert investment banker looking at the situation was able  
2 to attribute any particular downside to having Barclays be this  
3 shareholder with no intention -- no stated intention to affect  
4 the management or control of this company. That that is a  
5 hindrance to a capital markets transaction as opposed to every  
6 other reason why, in this market, it is difficult for a company  
7 like Evergreen Solar to raise money.

8 That would have to be the showing made. That there's  
9 something particularly unique about it's -- all the income is  
10 there, all the plans are there, the forecast for the future are  
11 there but just -- but somehow because Barclays has a 7.4  
12 percent position, which actually may even be less depending on  
13 when the earnings per share calculation is done, inhibits a  
14 transaction or makes it more expensive and that this is how  
15 much more expensive it is. That's the kind of specificity we  
16 believe you would need to find irreparable harm. And that is  
17 not even irreparable it's compensable by money because that's  
18 called a basis spread, that's called a premium that some other  
19 investment banker or underwriter wants to charge.

20 If we're going to anticipate some arguments  
21 afterwards, I'm happy to stop now.

22 THE COURT: Keep your powder dry for later?

23 MR. MORAG: Yes.

24 THE COURT: Okay. Is there anyone else who wishes to  
25 be heard at this point?

1 MR. WILTENBURG: Your Honor, David Wiltenburg,  
2 Hughes, Hubbard and Reed on behalf of James Giddens (Ph.) as  
3 trustee for the liquidation of Lehman Brothers, Inc.

4 We put in a very short response for purposes of  
5 today's hearing pointing out what we feel are problems with the  
6 case from the plaintiff's point of view, including a factual  
7 problem and a couple of legal issues as well.

8 First of all, I think there's no dispute that before  
9 the events of the week of September 15th began the title to the  
10 shares was in LBIE and that LBIE had, I think the contract  
11 says, all incidents of ownership including the right to sell  
12 the shares.

13 Now, on September 15th a lot of things happened but  
14 from the point of view of the plaintiff what happened is that  
15 they noticed that there had been a credit downgrade of Lehman  
16 Brothers Holdings, the guarantor, and that triggered a right  
17 that they exercised and it wasn't a right to terminate. It was  
18 a right to insist that collateral be posted. Collateral equal  
19 in value to the loan shares so that if the ensuing events lead  
20 to a breach of the agreement would have rights against that  
21 collateral. So that's basically all that happened on the  
22 plaintiff's side on the 15th.

23 Now, over in London on the 15th LBIE did its  
24 bankruptcy filing. And when that filing occurred there had  
25 been no breach and termination. When that filing occurred LBIE

1 still had all of the incidents of ownership including the right  
2 to sell the shares.

3 So, it's the plaintiff's proposition that upon the  
4 filing in London there was automatic revesting, there was an  
5 automatic divestment of title of this property that we would,  
6 in our system, deem to be property of the estate protected by  
7 the automatic stay and protected by many strong principles of  
8 law that apply to property of the bankrupt estate. Now I don't  
9 know exactly what English law is but I do recall understanding  
10 that they have a similar, I think they call it ring fencing  
11 principle. That is a protective barrier comes down around  
12 property of a bankrupt debtor.

13 And so --

14 THE COURT: Mr. Wiltenburg, you're making a number of  
15 comments about LBIE, however you're doing that, I take it, more  
16 by way of background because you're not here speaking on behalf  
17 of the LBIE administrators, correct?

18 MR. WILTENBURG: That's quite so, Your Honor.

19 THE COURT: Is there anyone in the courtroom who  
20 speaks on behalf of the LBIE administrators and who takes a  
21 position with respect to the preliminary injunction hearing  
22 today? Apparently not. Wait a minute, there is somebody.

23 MS. WARREN: Your Honor, Mary Warren as link leaders  
24 for the joint administrators. We're not a party to this  
25 proceeding.

1 THE COURT: Are you just here as an observer?

2 MS. WARREN: Yes.

3 THE COURT: Okay. Thank you for responding to that  
4 inquiry.

5 MS. WARREN: Yes. We're not taking any position  
6 because we're not a party to this case.

7 THE COURT: Okay. It does seem, however, that in  
8 hallway discussion you can confirm some of your theories about  
9 ring fencing and the like.

10 MR. WILTENBURG: Your Honor --

11 THE COURT: I guess what my question is, is why we're  
12 going into issues that relate to the LBIE case and English law  
13 to the extent applicable since you're speaking on behalf of  
14 your client the trustee of LBI.

15 MR. MORAG: Indeed, Your Honor. The reason is that  
16 the foundation premise of the case, as I read the papers, is  
17 that there was this automatic divestment of title that  
18 happened, upon the filing of the bankruptcy petition. And that  
19 is the foundation on which plaintiffs build the propositions  
20 that it was their property going forward from that time and the  
21 proposition that therefore when LBI conveyed or the property  
22 became part of the Barclays repo, that LBI was interfering with  
23 their title. This is by way of a comment that, that's a  
24 phenomenon that's unknown in our law and I don't think I've  
25 read support for the proposition that any such automatic



1 divestment of title can happen under the legal scheme that was  
2 in place.

3 And, Your Honor, as we've noted in other matters that  
4 have come before the Court, the Safe Harbor provisions that are  
5 features of United States -- both the United States Bankruptcy  
6 Code and the Securities Investor Protection Act, are not about  
7 divestment of title, are not about taking property of the  
8 estate and making it property of an individual creditor.  
9 They're about fixing gain or loss. They're about monetizing  
10 the financial impact of the bankruptcy filing of a particular  
11 party.

12 And so, this is also about, by way of saying that the  
13 whole foundation, that is that something, some change to title,  
14 took place during the week of the 15th. It seems to us that  
15 that can't be the case.

16 THE COURT: Ms. Harvey, are you just here as an  
17 observer or do you have anything to say? You don't have to say  
18 anything, I was just wondering.

19 MS. HARVEY: Diane Harvey, Weil Gotshal, representing  
20 Lehman Brothers Holding, Inc., debtor. Your Honor, we don't  
21 have any opening but we would like to reserve our right to  
22 cross examine the witness.

23 THE COURT: Fine.

24 MS. HARVEY: Thank you.

25 THE COURT: I think we've now heard what everybody

1 has to say at the outset and I won't muddy the water by making  
2 any further comments. Mr. Grillo, why don't you just proceed  
3 with your evidence?

4 MR. GRILLO: Thank you, Your Honor.

5 THE COURT: First of all, let me ask if there are  
6 stipulations with respect to --

7 MR. GRILLO: I was just about to address that, Your  
8 Honor.

9 THE COURT: Okay. Fine.

10 MR. GRILLO: If I could, before I was going to call  
11 my witness. Your Honor, the stipulations I think that we have  
12 with respect to the documents is that all of the documents that  
13 were submitted as exhibits, either to the verified complaint or  
14 in the responsive papers submitted by Barclays, I don't think  
15 any party has an objection to the authenticity or admissibility  
16 of those documents.

17 What we've prepared for the Court and Barclays'  
18 benefit was a binder which I can hand up, and we'd also hand up  
19 to the witness, that has the document in it. So if I may do  
20 that first, and I'll leave one on the chair.

21 THE COURT: That's fine.

22 MR. GRILLO: I have them both for you, spiral bound  
23 or in a binder, whichever Your Honor prefers.

24 THE COURT: I'm completely indifferent as to how it's  
25 bound.

1 MR. GRILLO: Okay. And then I'd like to leave one on  
2 the witness stand if I could.

3 THE COURT: Thank you.

4 MR. GRILLO: And just quickly, Your Honor, those  
5 documents, I think, are indexed on the cover and they include  
6 the verified complaint, the share lending agreement as filed  
7 and as executed, the letters that I referenced, the 13G and  
8 some of the papers from this court's proceeding. We can  
9 discuss them and move them into evidence at the end, if Your  
10 Honor likes or we can do it now by stipulation if there's no  
11 objection. But I don't think there's any issue with respect to  
12 any of the documents.

13 THE COURT: It's up to you. I mean, if they're going  
14 to be offered into evidence by stipulation we can do that now.  
15 If you're going to need the witness to do anything, in terms of  
16 identification or authentication, we can do it through the  
17 witness. But if there's an agreement why don't we do it now.

18 MR. MORAG: Your Honor, there's no objection from  
19 Barclays Capital.

20 THE COURT: Fine, it's admitted and part of the  
21 record.

22 (Debtor's Exhibit Binder was hereby admitted into evidence, as  
23 of this date.)

24 MR. GRILLO: Thank you, Your Honor. With that I'd  
25 like to call Michael El-Hillow to the stand, please.

1 THE COURT: It's probably going to be -- well, you've  
2 already taken the hard way up to the front. I was going to  
3 suggest you walk around the other way. No big deal.

4 (Witness duly sworn)

5 THE COURT: Please be seated.

6 THE WITNESS: Thank you.

7 Q. Okay. Just as a procedural matter before we introduce  
8 anything, as a matter of convenience there's a binder of  
9 documents in front of you and those are the documents that  
10 we'll be referring to.

11 A. Okay. Thank you.

12 Q. During the course of your testimony. With that, can you  
13 please state your name for the record?

14 A. Michael El-Hillow.

15 Q. And what is your position -- are you employed Mr. El-  
16 Hillow?

17 A. I am.

18 Q. And by whom?

19 A. Evergreen Solar.

20 Q. And what is your position with Evergreen Solar?

21 A. Chief financial officer.

22 Q. Okay. And can you generally describe for the Court's  
23 benefit what your responsibilities are as the chief financial  
24 officer of Evergreen Solar?

25 A. The major responsibility is to make certain that the

1 company has proper financial controls and also access to the  
2 capital markets as we pursue a very aggressive growth strategy.

3 Q. Right. And for purposes of background, can you describe  
4 for the Court and for the parties here, your last five years of  
5 professional experience?

6 A. I've been the chief financial officer of Evergreen Solar  
7 since January 2, 2007. Prior to that I was on the board of  
8 directors for two years. But also at that time I was the chief  
9 financial officer of a company, MTM Technologies in Stamford,  
10 Connecticut. And also Advanced Energy Industries of Fort  
11 Collins, Colorado.

12 Q. Thank you. You indicated that you were responsible for  
13 the access to the financial markets on behalf of Evergreen  
14 Solar. Do you have any familiarities of the matters that we've  
15 discussed today, particularly the share lending agreement that  
16 Evergreen Solar entered into with Lehman?

17 A. I do.

18 Q. Okay. And are you familiar with all of the transactions  
19 that took place pursuant to that agreement?

20 A. I am.

21 Q. And would it be fair to say that you were the point person  
22 for that transaction for Evergreen Solar?

23 A. Yes.

24 Q. Can you explain briefly the background that led to the  
25 entry into the shared lending agreement for the benefit of the

1 Court, please?

2 A. Absolutely. We are in the process of completing a factory  
3 in Devens, Massachusetts. Total cost of approximately 425  
4 million dollars. In order to complete that factory we had to  
5 raise approximately 375 million dollars earlier this year. The  
6 capital market were very challenging at the time, as they still  
7 are, even more so.

8 In order for us to raise the amount of capital we had to  
9 raise we had to enter into a convertible no transaction. Our  
10 market capitalization was not large enough to support a raise  
11 of that amount. And the convertible note was the most  
12 efficient and most effective way to access the capital that we  
13 needed.

14 Q. Okay. And with the completion of that transaction are  
15 your capital needs presently satisfied for the next three to  
16 four year period, or do you --

17 A. No. We have informed our shareholder base for well over a  
18 year it will need to raise an additional 400 million dollars in  
19 2009 as we continue to build out our expansion. We have on  
20 record to open a new factory in the early part of 2010. And so  
21 those funds would be required to open up that next factory.

22 Q. Okay. And in this regard, how important is it for you to  
23 keep control over the shares that are in the marketplace --

24 MR. GRILLO: Strike that.

25 Q. Are shares necessary for you to raise additional -- do you

1 raise additional capital in the equity markets, or just purely  
2 in the debt markets?

3 A. We've bid on records saying we'd try to access the debt  
4 markets; of course, the debt markets are very challenging. We  
5 would access the equity markets if need be.

6 Q. All right.

7 A. But our preference would be to access the debt markets.

8 Q. But have you made any inquiry to try and access the debt  
9 markets at present?

10 A. We have.

11 Q. And how have those efforts gone?

12 A. Very difficult.

13 Q. When you access the equity markets, do you go back to your  
14 existing shareholders?

15 A. We do.

16 Q. And have you spoken with your existing shareholders since  
17 the time that this event has occurred with Lehman?

18 A. Numerous times. Most recently, yesterday.

19 Q. And what has been the reaction of the investors at this  
20 point in time?

21 A. Quite concerned. The significant dilution that has  
22 occurred. Because the transaction, as you pointed out, it was  
23 never the intent that these shares would be included in our  
24 outstanding share count for gap purposes. They are outstanding  
25 for corporate purposes. That was probably the main reason why

1 we went down this road, the ability to maximize our earnings  
2 per share which is monitored very closely by the equity  
3 markets. And is really the basis for the ability to raise  
4 either equity or debt. Because debt must be paid off and  
5 typically is paid off by internal cash generation, which would  
6 require another factory, or through the subsequent issuance of  
7 equity.

8 Q. Do you have -- will you have enough cash to pay off that  
9 debt from your operations over the course of the next twelve to  
10 twenty-four months?

11 A. We will not.

12 Q. So you need to go back to the equity markets again to  
13 raise that capital?

14 A. We would need to go back to the equity markets to raise  
15 the capital to open up another facility. The facility -- the  
16 Devens facility would most likely not be able to generate the  
17 amount of cash that we'd need to pay off that debt when it  
18 comes due in 2013.

19 Q. Okay. And how many people do you employ at the -- or how  
20 many people do you intend to employ at the Devens facility?

21 A. Approximately 800.

22 Q. And how many people do you employ overall, or would you  
23 expect to employ overall upon the completion of the facility?

24 A. Approximately 1,100.

25 Q. You indicated that you are familiar with the terms of the



1 share lending agreement, is that correct?

2 A. That is correct.

3 Q. I'd ask you to take a look in your binder at document 2?

4 A. Yes.

5 Q. And do you recognize for the record document 2?

6 A. I do.

7 Q. And can you identify it for purposes of the written record  
8 here to the Court?

9 A. It is the share lending agreement between us and Lehman or  
10 Lehman and their affiliates.

11 Q. And did you participate in the negotiations of that  
12 document?

13 A. I did.

14 Q. And were you a signatory of that document on behalf of  
15 Evergreen?

16 A. I was.

17 Q. I'd ask you to take a quick look to refresh your  
18 recollection at Section 7 of that document, that would be page  
19 10, part benefits of the parties.

20 A. Okay, I'm there.

21 Q. Okay. The document stated that so long as the borrower,  
22 which was Lehman under the document, was the record owner of  
23 the loan shares it wouldn't exercise the right to vote or take  
24 any action with respect to those shares. At any time during  
25 the course -- from the entry of this agreement, did Lehman ever

1 vote those shares that it held in its possession?

2 A. Not to my knowledge.

3 MR. MORAG: Your Honor, I'm sorry to object. But  
4 there is no entity in this agreement defined as Lehman. The  
5 borrower is defined as Lehman Brothers International Europe and  
6 I would just like to --

7 THE COURT: It's a fair objection. The question is  
8 ambiguous in its use of the term Lehman, given the  
9 identification of the borrower as Lehman Brothers International  
10 Europe and the identification as Lehman Brothers Inc. as agent  
11 for borrower.

12 MR. GRILLO: I'll ask a couple clarifying questions,  
13 Your Honor.

14 BY MR. GRILLO:

15 Q. In your relationship -- in Evergreen's relationship with  
16 any Lehman entity, can you tell us generally who you dealt with  
17 and who they represented, to your knowledge?

18 A. We dealt with key investment bankers. One, in particular,  
19 we were told was in charge of United States investment banking  
20 for Lehman Brothers. We had no dealings to the best of my  
21 knowledge with any of the so-called affiliates. We were  
22 dealing with what we thought was Lehman Brothers, Lehman  
23 Brothers Holding. Lehman Brothers.

24 Q. Did anyone ever represent to you that they were from  
25 Lehman Brothers International Europe as oppose to Lehman

1 Brothers Inc. or Lehman Brothers Holding?

2 A. No.

3 Q. Did they ever make any distinction with respect to any  
4 negotiation that you had with respect to any of the various  
5 Lehman entities?

6 A. They spoke about the entities themselves, as making it  
7 efficient for them to complete the transaction. But it was  
8 always my understanding that we were dealing with Lehman  
9 Brothers Holding as the parent company of Lehman, and they  
10 would guarantee the entire transaction. All these other  
11 entities were for their convenience not ours.

12 Q. Okay. Did anyone ever represent to you that they were  
13 participating specifically on behalf of Lehman Brothers  
14 International Europe then?

15 A. No.

16 Q. Okay. And anyone separately representing that they  
17 were --

18 MR. GRILLO: Excuse me, strike that.

19 Q. Did anyone ever represent to you that they were there on  
20 the behalf of Lehman Brothers Inc.?

21 A. No.

22 Q. Did you have any reason to believe that there was any  
23 distinction between any of the Lehman entities?

24 A. Not as it would have affected us, no.

25 Q. Thank you. With that, I'd ask you to go back to Section 7

1 of the agreement?

2 A. Okay.

3 Q. I think the last question that I'd asked you prior to the  
4 objection was whether or not any Lehman entity had every  
5 expressed to you any interest in voting the shares in the  
6 possession of any Lehman entity?

7 A. No.

8 Q. And at any time did they ever make a public filing with  
9 respect to the ownership -- did any Lehman entity make a public  
10 filing like a 13(g) or a 13(d) in connection with any of the  
11 shares?

12 A. Not that I'm aware of.

13 Q. And do you generally follow that as in your capacity as  
14 CFO?

15 A. They are typically all addressed to my attention, so, yes.  
16 And we also file it through the public filings.

17 Q. So it's safe to say you would be aware if such a filing  
18 was, in fact, made?

19 A. Absolutely.

20 Q. Okay. And your statement was that there was no such  
21 filing made on behalf of Lehman. Okay. Did anyone at Lehman  
22 ever approach you about the possibility of voting the shares  
23 for as long as they held them?

24 A. No.

25 (Pause)

1 Q. In connection with the Lehman transaction did -- excuse  
2 me. In connection with the share lending agreement did  
3 Evergreen make a public filing in connection with that  
4 transaction?

5 A. Yes.

6 Q. Okay. And could you sum up to your knowledge what the  
7 substance of that filing was?

8 A. Well, I believe there were two filings. And one was  
9 obviously the filing ultimately for the convertible debt. And  
10 the other one I believe was to register the 30.9 million shares  
11 as part of the share lending agreement.

12 Q. Right. And I would ask you to refer to what's been marked  
13 as Tab or Exhibit 7 in your binder?

14 A. Uh-huh.

15 Q. Okay. I would ask you if you're familiar with what's been  
16 marked as Tab 7 in the binder?

17 A. I am.

18 Q. And could you just describe for the written record what  
19 that document is?

20 A. Is a form A-K and it describes entry into this  
21 transaction, the description of the convertible notes and the  
22 cap call transaction.

23 Q. Okay. And by looking at that agreement, the form of which  
24 I guess was taken from the SEC documents. Were you the  
25 signatory to that public filing?

1 A. Yes.

2 Q. And so as such you were familiar with its contents?

3 A. I was. And I should also point out it also addresses the  
4 common stock lending agreement, the entire transaction. Yes,  
5 sir.

6 Q. Okay. I would ask you to refer to -- the pages are not  
7 number but it's the third page of text.

8 A. Beginning with what?

9 Q. The top line says "common stock borrower's election at any  
10 time."

11 A. Yes.

12 Q. Okay. I'd ask you to take a look at the last sentence of  
13 that first full paragraph that starts with the borrowed shares.  
14 And I'll just read it into the record; it says "well, the  
15 borrowed shares would be considered issued to outstanding for  
16 corporate law purposes. The company believes that under U.S.  
17 gap as currently in affect, the borrowed shares will not be  
18 considered outstanding for purposes of computing and reported  
19 earnings per share because the borrowed shares must be returned  
20 to the company no later than July 15, 2013, the maturity date  
21 of the notes."

22 Can you explain to us what your understanding of that  
23 provision was at the time it was entered into?

24 A. Well, certainly a critical decision because when we were  
25 approached about the share lending arrangement it was critical

1 to us that we minimize the number of shares outstanding. And  
2 we talked to our advisors, our lawyers, and our accountants and  
3 our understanding was that for legal purposes, yes, they would  
4 be in the marketplace. But for accounting purposes, which is  
5 sort of my capacity, that's what the financial community  
6 tracks, that they would not be considered as outstanding.  
7 We're a very conservative company so we also check other  
8 transactions that have occurred in the marketplace prior to our  
9 entering into this transaction. And there were other companies  
10 that had done it earlier in the year, had filed their documents  
11 with the Security and Exchange Commission. And had been able  
12 to use this transaction type.

13 Q. Okay. And what's the effect of having those shares  
14 deemed issued and outstanding for accounting purposes?

15 A. Well, on the time of the transaction we had 120 million  
16 shares outstanding in the marketplace, so adding these thirty-  
17 one million shares, in effect, have diluted our shareholders by  
18 twenty-five percent. You would think that the direct cause  
19 would be that you would see an approximate twenty-five percent  
20 reduction in your stock price since you got no consideration  
21 for those shares. And so that would be the direct impact.

22 Q. And how has that affected your ability to raise or --

23 MR. GRILLO: Strike that.

24 Q. Has it affected your ability to go to the marketplace to  
25 raise more money?

1 A. It will certainly affect our ability when we try to access  
2 the markets. Our shareholders and other people that might be  
3 interesting in buying our shares are very concerned about the  
4 significant number of shares we have outstanding, given the  
5 size, and I'll say the lifecycle, of our company. 160 million  
6 shares is a significant number of shares.

7 Q. And when you say it will have a significant effect do you  
8 mean a positive or a negative?

9 A. A negative effect.

10 Q. In what respect?

11 A. Because many people do not want to buy into a company that  
12 has such a large amount of shares outstanding, because it  
13 obviously affects the earnings per share, which is the  
14 multiplier with a P/E ratio, that ultimately we allow that  
15 investor to seek increase in his or her investment going  
16 forward.

17 Q. I'd like to sort of turn to the voting impact of the  
18 shares. And I'd ask you to turn to document 6 in the binder in  
19 front of you. And just for the written record I'd ask you if  
20 you could identify what that document is?

21 A. I believe it's a Schedule 13-G filed by Barclay's PLC.

22 Q. And prior to this hearing had you seen that document  
23 before?

24 A. I had.

25 Q. Can you explain for the Court's benefit when you first



1 became aware of that document?

2 A. I received notification, interestingly enough, from a  
3 shareholder. I believe it was on -- I want to say on October  
4 9th. I don't remember the exact date, but it was sent to me  
5 from the shareholder and then subsequently I was provided the  
6 document itself by Christian Ehrbar, our general counsel.

7 Q. Did you have any notice prior to receiving the document  
8 that Barclays had purchased the shares?

9 A. No.

10 Q. Had you made inquiry at the time that the bankruptcy case  
11 was filed, to Lehman or to anyone else, as to where these  
12 shares were?

13 A. Immediately upon the trans -- I'll say the situation on  
14 September 15th, yes, we called all of our contacts at Lehman  
15 and asked were there any shares still held by Lehman. And we  
16 were told there were none.

17 Q. And at any time prior to the receipt of this 13-G on  
18 approximately October 9th, as you testified, did anyone from  
19 Barclays contact you regarding their acquisition of the shares?

20 A. No.

21 Q. Did anyone contact you in connection with the share  
22 lending agreement anytime between the 15th of September and  
23 from when this was received?

24 A. No.

25 Q. And for purposes of the record, the statement indicates

1 that there are approximately twelve million one, almost 200,000  
2 shares at issue. What percentage of your overall  
3 capitalization would that be in terms of issued and outstanding  
4 shares?

5 A. Approximately seven percent today.

6 Q. And can you explain to me, sort of from a company's  
7 perspective, how holders like that are typically treated and  
8 what effect that has on the governance and the operation of  
9 your company, if any?

10 A. Well, as a company we treat all of our shareholders, but  
11 the fact is our larger shareholders, they call, we respond. We  
12 call them back. They are shareholders. We're attuned to their  
13 needs, their concerns, and so we would respond immediately to  
14 our shareholders.

15 Q. Right.

16 A. Especially a shareholder of this magnitude.

17 Q. What challenges, if any, are presented by virtue of having  
18 shareholders with holdings the size that Barclays now has?

19 A. You know, for a company our size and the global plans we  
20 have we will more than likely need to go get shareholder  
21 approvals for certain future transactions. Any large  
22 shareholder would obviously have a big say in that transaction,  
23 either individually or through talking to other shareholders.  
24 They would have a big impact on deciding how we take this  
25 company forward.

1 Q. So then with respect to -- when you say with transactions,  
2 can you be a little bit more explicit into what kind of  
3 transactions that they would have an effect on?

4 A. Well, as an example, earlier this year we went to our  
5 shareholders to get approval to increase the number of shares  
6 outstanding for our corporation so we could move forward with  
7 our growth plans. We needed those shares authorized in order  
8 to do this transaction that we did in the summer and also a  
9 transaction we did earlier this year. That would be one  
10 situation. Any type of transaction that would require, you  
11 know, use of more than twenty percent of our shares.

12 Q. Would that include, for example, strategic transactions?

13 A. Yes.

14 Q. Okay. Like mergers?

15 A. Yes.

16 Q. And given where Evergreen is in connection with its  
17 overall development, does it survive presently on its own  
18 earnings?

19 A. We do not.

20 Q. So is there a significant possibility of having either a  
21 major financing transaction or a strategic transaction in the  
22 course of the next, call it, twelve to eighteen months?

23 A. Yes.

24 Q. Okay. Can you explain your answer, please?

25 A. Well, I think the most important thing is as of today we

1 are going through about seven to ten million dollars a month in  
2 cash. Much of that -- that's from operations, not even talking  
3 about the build out of the facility in Danvers, Massachusetts.  
4 It's the Danvers, Massachusetts facility that will allow us to  
5 become profitable and cash flow positive. Until that time we  
6 need access to capital markets, either through equity or debt  
7 in the public marketplace or working capital lines of credit.  
8 We survive on our ability to access capital markets. We do not  
9 generate cash internally.

10 Q. And how critical is the participation of your shareholders  
11 in that process?

12 A. Incredibly critical.

13 Q. In what respect?

14 A. Well, first of all, anything that's publicly related we  
15 would go to them, first and foremost. We would talk to our  
16 shareholders. Also, in order to access, I'll say, the private  
17 capital markets, any lending institution is very much attuned  
18 to a company's ability to raise equity down the road if they  
19 need to do that in order to pay that debt off. So they go hand  
20 in hand. They're not severable, especially in this  
21 environment.

22 Q. In that, regarding your public filings, do you make any  
23 disclosure with respect to risk factors with significant  
24 holders of shares?

25 A. Yes, we do. We can talk about the impact that our larger

1 shareholders could have on our ability to execute operations  
2 going forward or make strategic decisions.

3 Q. And what do you say about that process, typically? Just  
4 generally in your risk factors.

5 A. That we would have to approach our shareholders and get  
6 counsel and ultimately approval for the things we'd want to do.

7 Q. Right. And what happens if a large block of shares does  
8 not vote in favor of something at the outset?

9 A. Well, obviously you want to have as high an approval from  
10 your shareholders as possible. But I guess it would depend  
11 upon the transaction. Some require, you know, more than fifty  
12 percent of total shares outstanding. Some transactions require  
13 fifty percent of shares that are voted. But any large  
14 shareholder individually, but certainly talking to other  
15 shareholders, could prevent us from moving forward with our  
16 plans.

17 Q. Then is it fair to say that that gives them some leverage  
18 in those transactions?

19 A. It gives them, I would say, influence for sure. Influence  
20 certainly translates to leverage. Yes.

21 Q. We've talked about transactions. What about with respect  
22 to corporate governance? What impact does having a major  
23 shareholder like this have on your corporate governance?

24 A. Well, as I said, all shareholders are important, but if  
25 you own a bigger percentage of the company you have more

1 access, more influence, just from your vote. And we will  
2 listen to those shareholders. Our shareholders are important  
3 to us. So, yes, they could have a very, very important impact  
4 on our organization.

5 Q. So, for example, would they have an ability to exercise an  
6 influential vote with respect to the composition of the board  
7 of directors?

8 A. They certainly would. Yes.

9 Q. Could they bring certain shareholder referenda to the  
10 board or a slate of positions to the board as a five percent  
11 holder and demand that the board consider those matters?

12 A. I certainly believe they could, but I would point out that  
13 we also have a staggered board. So I'm not a corporate  
14 governance expert. I know it somewhat, but they certainly  
15 could affect the election of the directors that we elect in  
16 their year of election.

17 Q. Turning back quickly to document 7 for just a moment and  
18 the section that we just read on the third page of text. I'm  
19 looking at the paragraph that starts June 26, 2008. Are you  
20 with me, Mr. El-Hillow?

21 A. I'm there. Yes.

22 Q. Okay. Thank you. It says in the second sentence of that  
23 paragraph 18,184,511 shares of the borrowed shares were sold to  
24 the public concurrently with the offering of the notes at 9.50  
25 per share and that the remaining borrowed shares will be sold

1 at prevailing market prices at the time of sale or at  
2 negotiated prices. It says the sale of the borrowed shares  
3 will be made for the account of the common stock borrower and  
4 the company will not receive any proceeds from the sale of the  
5 borrowed shares. First of all, are those statements all true  
6 and correct to your knowledge?

7 A. Yes, they are.

8 Q. If that's the case were, in fact, to your knowledge, the  
9 eighteen million shares sold into the marketplace?

10 A. Yes.

11 Q. And at an approximate price of 9 --

12 A. 9.50.

13 Q. -- per share.

14 A. Yes.

15 Q. And by my calculation, ballpark, that would have raised  
16 approximately 160 to 175 million dollars. Is that correct?

17 A. Yes.

18 Q. So of that 160 or 175 million dollars did the company get  
19 any of the proceeds of that transaction?

20 A. No.

21 Q. What is your understanding as to where the proceeds of  
22 that transaction went?

23 A. They went to Lehman Brothers or Lehman. Lehman.

24 Q. What? One of the Lehman --

25 A. One of the many Lehman --

1 Q. But you don't know which one.

2 A. No.

3 Q. Is that your statement?

4 A. We do not know which one.

5 Q. And it is fair to say that the anticipation was that at  
6 the end of the period they would, in fact, then come in and  
7 satisfy their end of the share lending agreement?

8 A. Yes.

9 Q. Has anyone from Barclays indicated to you that they would,  
10 in fact, participate in that transaction and assume Lehman's  
11 obligations in respect to the share lending agreement?

12 A. No.

13 Q. Has there been anyone else who stepped up and said we  
14 would participate in that transaction on behalf and assume  
15 Lehman's obligations under that agreement?

16 A. No.

17 Q. So, effectively, then, Lehman has gotten the benefit prior  
18 to the bankruptcy case of whatever the proceeds, call it 160 to  
19 175 million dollars, and what did Evergreen get for the benefit  
20 of that?

21 A. Nothing.

22 Q. Final question. Did any of the Lehman representatives  
23 from and after the time of the bankruptcy indicate that there  
24 would be any party who'd be willing to step into the shoes of  
25 Lehman as far as that transaction goes?



1 A. I approached my contacts from Lehman that went to Barclays  
2 to inquire, and they came and met with me, but they said there  
3 was no way they would be able to do anything for me. It was a  
4 very short meeting. Just once.

5 Q. So, effectively, now, Evergreen is out the value of those  
6 shares, which in the summertime could have been anywhere from  
7 160 to 175 million dollars?

8 A. That is correct.

9 Q. And what impact will that have on your fundraising on a go  
10 forward basis?

11 A. It will have a significant impact, because we only have so  
12 many shares that are available to put into the marketplace.  
13 And it will more than likely impact our ability to raise funds  
14 at reasonable rates.

15 MR. GRILLO: Thank you. I have no further questions  
16 on direct, Your Honor.

17 THE COURT: Cross-examine.

18 CROSS-EXAMINATION

19 BY MR. MORAG:

20 Q. Good afternoon, Mr. El-Hillow.

21 A. Good afternoon.

22 Q. You testified that lawyers were involved in these  
23 transactions, is that correct?

24 A. Correct.

25 Q. Did they review the documentation and the public filings

1 of Evergreen Solar?

2 A. I believe they did, yes.

3 Q. Did you personally draft the description of the  
4 transaction or was that done by lawyers?

5 A. It was done by lawyers, accountants, our internal, and I  
6 had impact on the disclosures, yes.

7 Q. If you could to turn tab 7 which was the AK fund we were  
8 looking at

9 A. Um-hmm.

10 Q. At the end, if you sort of flip to the very end of the  
11 document there are in fact numbered pages. About halfway down  
12 the page, you'll see some numbering?

13 A. Um-hmm, yes.

14 Q. I'd like you to turn to page 14, the page that's numbered  
15 14 at the bottom, please.

16 A. I'm there.

17 Q. And I believe you testified, and if there's any concern in  
18 your mind or doubt in mind you can flip back to the first page  
19 of this part of tab 7 which would obviously be page 1.

20 A. Um-hmm.

21 Q. But I would focus you on page 14 to the paragraph that is  
22 number two, "Borrowing and delivery of the securities," do you  
23 see that?

24 A. I don't think I'm on the same page 14 as you are, I'm  
25 sorry.

1 THE COURT: Neither am I.

2 MR. MORAG: Okay.

3 Q. If you turn to the very end of exhibit 7, it should say

4 A3. See that? At the center of the page, Schedule 2, A3?

5 A. No but I guess there are several page fourteens in here.

6 Q. If you turn to tab 8 and then just put tab 8 down so that  
7 you're on the last page of tab 7.

8 A. Okay.

9 Q. Is there a page that says A3?

10 A. Yes.

11 Q. Okay. If you would turn back a few more pages, do you see  
12 a page that says thirty six at the top?

13 A. I do.

14 Q. Okay and if you flip back from there to, I guess, would be  
15 twenty-two pages to page fourteen. I don't know how else to  
16 explain.

17 A. I believe I'm there.

18 Q. Okay. Now --

19 THE COURT: What does this page fourteen have on it?  
20 I want to make sure I am looking at the right page 14.

21 MR. MORAG: Does it have that 2 that's in the center  
22 of the page called "borrowing and delivery of securities?"

23 THE COURT: "Borrowing and delivery of securities".

24 MR. MORAG: Yes,

25 THE WITNESS: Yes.

1 Q. I think for identification purposes it should be noted  
2 that this is page fourteen of exhibit 1.2.

3 Yes - to the AK and which is entitled, "Underwriting  
4 Agreement."

5 A. Right.

6 Q. Okay. To make this simpler, if you would go to the first  
7 page of Exhibit 1.2, please, just so that we don't have any  
8 confusion as to the nomenclature, which is the first page of  
9 this Underwriting Agreement. So it would require flipping back  
10 fourteen pages.

11 A. The one that's headed 30.8 -- the 3856 shares?

12 Q. Yes.

13 A. Okay.

14 Q. I mean, this is a -- do you recognize this document, maybe  
15 perhaps not in this form, but is this not a letter that you  
16 received or an agreement that you received and signed is the  
17 underwriting?

18 A. Yes.

19 Q. Okay. It probably didn't look like this when you got it,  
20 but this is how, but you recognize it as the underwriting  
21 agreement?

22 A. Um-hmm.

23 Q. So just so that we have our terms clear, do you see that  
24 in the third line of - on page - the first page of exhibit 1.2  
25 Lehman Brothers International (Europe) is identified as the

1 borrower?

2 A. Yes.

3 Q. Okay. And then do you see towards the very bottom of the  
4 page, above the paragraph that's numbered one that the company  
5 being Evergreen Solar, Inc. hereby agrees with Lehman Brothers  
6 Inc. and Lehman Brothers Inc. is defined as the underwriter?

7 A. Yes.

8 Q. Okay. Now if we can go back to page fourteen.

9 A. Okay.

10 Q. Can you read the paragraph to yourself first?

11 A. Are you talking about paragraph two?

12 Q. Yes, the subject two of the terms and conditions.

13 A. Okay.

14 Q. Does this not state that, "subject to the terms and  
15 conditions set forth herein and in the common stock lending  
16 agreement the company," that's Evergreen, correct?

17 A. Yes.

18 Q. "Agrees to issue and lend to the borrower," and that's  
19 Lehman Brothers International Europe, correct?

20 A. Yes.

21 Q. Okay. "And the borrower agrees to borrow from the company  
22 up to 30,856,538 shares of common stock and the underwriter".  
23 And that's Lehman Brothers Inc., correct?

24 A. Yes.

25 Q. "Upon such issuance and loan to the borrower agrees to

1 purchase such shares from the borrower." Did I read that  
2 correctly?

3 A. Yes.

4 Q. To your knowledge does that accurately state the  
5 transaction or that piece of the transaction?

6 A. Yes.

7 Q. And you were aware that in July of 2008, right after this  
8 transaction closed, Lehman Brothers Inc. did place eighteen  
9 million shares with the public, correct?

10 A. Yes.

11 Q. So, you understood, is it not the case, that if for any  
12 reason the share lending agreement were to terminate, Lehman  
13 Brothers Inc. would have to go out and find eighteen million  
14 shares of Evergreen common stock to return to you, correct?

15 A. I'll tell you my outstanding, yes, plus or put collateral,  
16 cash collateral in place for our benefit, either or.

17 Q. Is it your understanding that cash collateral was - what  
18 was the trigger for your entitlement to demand cash collateral?

19 A. A downgrade of the debt of Lehman Brothers.

20 Q. Okay. Otherwise Evergreen entered into this transaction  
21 without the protection of any collateral, correct?

22 A. Yes.

23 Q. So, again, in this situation, let's say it's July, and for  
24 whatever reason Lehman Brothers International Inc., the  
25 borrower, decided to terminate the share lending agreement.

1 Given that it happened up to that point, they would have to go  
2 out in the market and find eighteen million shares to return,  
3 correct?

4 A. Yes. Well, actually, but they'd have to find eighteen but  
5 return 30.9 because they had 12.2.

6 Q. The present trading volume, daily trading volume of  
7 Evergreen Stock is around four to seven million shares per day,  
8 isn't that right?

9 A. Yes. It's reached a seven, yes.

10 Q. You say seven?

11 A. Yes, recently.

12 Q. So some days it's higher than that?

13 A. The average that we see is about seven million shares a  
14 day.

15 Q. Now you say that - you mentioned something about having a  
16 hundred and sixty million shares outstanding?

17 A. Correct.

18 Q. And that was as of July 2008?

19 A. No. Before the transaction we had a hundred and twenty  
20 million shares outstanding. So this transaction occurred on  
21 July 2nd, I believe.

22 Q. Well, let me ask it differently. You made a distinction  
23 between corporate law purposes and accounting purposes,  
24 correct?

25 A. Right. Yes.

1 Q. So let's just -- so that I'm clear, the hundred and sixty  
2 million is the corporate law purposes?

3 A. Correct.

4 Q. So that's shares outstanding, not all of which you're  
5 saying are counted for earnings per share calculations?

6 A. Correct.

7 Q. And the number that were counted for earnings per share  
8 calculations as of July?

9 A. You need to do a weighted average calculation, I believe  
10 for EPS purposes is around one hundred and eighteen million  
11 shares.

12 Q. Have you actually calculated the effect on earnings per  
13 share from the - as a result of the current situation, as  
14 you've described?

15 A. I just increased the shares outstanding by the 30.9  
16 million shares. It's just a straight division, correct.

17 Q. And there's nothing short of recovering eighteen million  
18 shares from some Lehman entity that would remove the eighteen  
19 million shares from the earnings per share calculation going  
20 forward, is that in fact right?

21 A. That is my understanding, yes.

22 Q. Now I believe you testified that potential investors and  
23 current shareholders thought that your one hundred and sixty  
24 million outstanding was already too high, is that correct?

25 A. They're concerned about the level of shares we have in the



1 marketplace, correct.

2 Q. And that was before September of 2008, correct?

3 A. Yes.

4 Q. With respect to the issue of the 13G, you testified that  
5 to your knowledge Lehman - no Lehman entity filed the 13G form,  
6 correct?

7 A. Correct.

8 Q. But you don't know precisely why no Lehman entity filed a  
9 13G form, do you?

10 A. They didn't own the shares.

11 Q. Did they ever tell you that?

12 A. Yes, we lent them the shares. That was the negotiations.  
13 We lent them the shares. They didn't own the shares.

14 Q. But if Lehman had placed in the market the eighteen  
15 million and there was one holder of over five percent, that  
16 person would have had to file a 13(g), correct?

17 A. Correct.

18 Q. Now on the issue of voting, there have been no shareholder  
19 votes since September 15th, 2008, have there?

20 A. That's correct.

21 Q. You said that a seven percent shareholder could have a big  
22 impact, correct?

23 A. Could have influence, yes.

24 Q. But there has been no vote, no proposal that you've -- you  
25 made to shareholders for which Barclays would ask to either

1 vote yes, no, or abstain, isn't that right?

2 A. Correct.

3 Q. And in fact if there were a proposal that Barclays voted  
4 for, that would be a good thing for the company if you're a  
5 sponsor of the proposal, correct?

6 A. Correct.

7 Q. And you have no basis as you're sitting there today to  
8 know what Barclays capital vote might be on any particular  
9 proposal that might be coming up for the shareholders in the  
10 next year, is that correct?

11 A. That is correct.

12 MR. MORAG: Your Honor, if I may consult for one  
13 second, we may be at the end.

14 THE COURT: Sure. If the witness would like some  
15 water?

16 MR. MORAG: We have a bottle, Your Honor, a bottle  
17 coming up as well.

18 THE WITNESS: Oh, thank you.

19 BY MR. MORAG:

20 Q. One last question. You do have up to two hundred fifty  
21 million shares authorized, correct?

22 A. That's correct.

23 MR. MORAG: No further questions at this time.

24 THE COURT: Are there further questions of the  
25 witness? Any redirect?

1 MR. GRILLO: Yes, Your Honor. Just a couple quick  
2 questions on redirect.

3 REDIRECT EXAMINATION

4 BY MR. GRILLO:

5 Q. I just want to clarify a couple of answers because I  
6 wasn't sure that I had understood them. One of the questions  
7 was, "were your shareholders - did you discuss the 160 with  
8 your shareholders before September 13th or were those  
9 discussions had after the effect of this transaction?

10 A. Our shareholders were a bit concerned about the number of  
11 shares we've had outstanding well over a year. They were  
12 concerned with the hundred and twenty million share level. The  
13 reason we did the transaction we did in the summer, that three  
14 hundred and seventy five billion dollar convertible note  
15 transaction -- it settles for cash not for shares, so we were  
16 very attuned to the dilution of our shareholders. So those -  
17 that discussion, those discussions have occurred for well over  
18 a year. It was made even worse by the fact that these 30.9  
19 million shares that our shareholders thought were lent, that  
20 would not be included in our outstanding shares for EPS were  
21 now included in outstanding shares for EPS.

22 Q. Mr. Morag asked you a question with respect to the effect  
23 that Barclays has, that Barclays could vote in favor of  
24 something that you can oppose, correct? He asked you that, do  
25 you remember he asked that question?

1 A. Yes. Right.

2 Q. I think I asked you on direct, but I just want to confirm,  
3 have you ever heard from Barclays since they closed this  
4 transaction?

5 A. Other than the three representatives that I told you went  
6 from Lehman to Barclay, no.

7 Q. And when you asked them if they were interested in  
8 continuing to work with the company, did you get a response to  
9 that question?

10 A. They were interested in working on a new transaction,  
11 which we said was unacceptable. They were not interested in  
12 helping us solve the problem that was created.

13 Q. Okay. But did anyone tell you - did you ever learn from  
14 Barclays at any point in time what they paid for the shares?

15 A. Did not.

16 Q. Did they - did anyone from Barclays ever contact you  
17 saying that they were interested in voting those shares?

18 A. No.

19 Q. Has anyone from Barclays ever expressed any interest in  
20 the company whatsoever?

21 A. No.

22 Q. So, if you needed to go for a vote on the shares, would  
23 you know who at Barclays to contact?

24 A. Didn't know who to contact in September, don't know today.

25 Q. We have no further questions, Your Honor.

1 THE COURT: Anything more? Or do you want to leave  
2 it alone. You're free to do either.

3 MR. GRILLO: We'll leave it alone.

4 THE COURT: Fine. Witness is excused.

5 THE WITNESS: Thank you, Your Honor.

6 THE COURT: Anything more? Is that your case?

7 MR. GRILLO: Those are the witnesses, Your Honor. I  
8 would take a couple of minutes to close, if I could.

9 THE COURT: Let me make the following suggestion, in  
10 light of the fact that the witness was parched and needed to  
11 drink, that maybe there are others how need a five or ten  
12 minute break. Let's take a ten minute break and resume for  
13 further argument at five to 6.

14 (Recess from 5:44 p.m. until 6:00 p.m.)

15 THE COURT: Be seated, please. Closing argument?

16 MR. GRILLO: Yes please, Your Honor.

17 We came to this Court today, Your Honor, to explain,  
18 sort of, what makes Evergreen's situation in this transaction  
19 unique, why the harm it suffers is unique and also why the  
20 balance of the harms, in that case or in this instance, is  
21 unduly burdensome to Evergreen as opposed to Barclays.

22 What Mr. El-Hillow testified to today was to say they  
23 have to go back to the capital markets. They're going back to  
24 the capital markets quickly. This transaction has a very  
25 negative impact, both from a governance perspective and from a

1 fundraising perspective. This is not IBM that operates off its  
2 cash flow. I think what Mr. El-Hillow said was specifically  
3 that they operate at a seven to ten million dollar a month  
4 loss. And that as a result they can't fund themselves from  
5 operations.

6 The anticipation in connection with this transaction,  
7 what they bargained for at the end of the day, was an ability  
8 to keep their shares off the marketplace or put into the  
9 marketplace with an understanding that they can come back.  
10 Lehman is not longer there to perform. So they know they're  
11 not getting the benefit of that transaction. They know that  
12 those eighteen million shares are out there in the marketplace  
13 and they can't get paid for them and at best they have a breach  
14 of contract claim.

15 What they don't or what separates the rest of this  
16 transaction from that is that the remainder of the shares,  
17 after they made due inquiry, after they tried to find out where  
18 they were and what was going on and after they were stonewalled  
19 by Lehman were sold in a process for which they didn't have  
20 notice, for which they couldn't otherwise -- or which they  
21 weren't otherwise participating because they didn't even know  
22 where the shares were.

23 And as a result, that those shares being out there in  
24 the marketplace and now concentrated in the hands of one party  
25 changes the way that they have to run their company. It

1 changes how they exercise their votes. It changes how they go  
2 to the marketplace, how they get approval for corporate  
3 governance issues and whether or not somebody will even answer  
4 the phone in respect to those shares.

5 Mr. El-Hillow testified that nobody from Barclays has  
6 reached out to them or there hasn't been a vote yet. There  
7 will be votes with respect to transactions on a go forward  
8 basis.

9 THE COURT: With respect to the argument you're  
10 making, I think you're mischaracterizing the evidence that I  
11 heard. There are no current needs to go to shareholders for  
12 approval, there are no current transactions that are in  
13 prospect, there are no transactions that have even been, based  
14 on the testimony, discussed with any third party. This is all,  
15 my term, somewhat speculative.

16 While it may happen some time in the future, there's  
17 no indication that it's about to happen.

18 MR. GRILLO: I would disagree with one portion of  
19 that, Your Honor. What I would say is that he is -- what Mr.  
20 El-Hillow did testify to is that he was meeting with investors,  
21 that he knows he needs additional capital, that it's not an  
22 overnight process. There is -- it is correct to say that there  
23 is no vote pending today but that the fundraising for a company  
24 like Evergreen is a process. And you go and you talk to your  
25 shareholders, and I think he indicated that he has, in fact,

1 spoken to his shareholders who are not pleased with where  
2 things are, making it doubly difficult to raise money under the  
3 current circumstances.

4 So I agree with the proposition that there is not  
5 presently a vote pending, okay. But I think what he testified  
6 to when I asked the question was, do you anticipate going to  
7 the market within the next twelve months? The answer was yes.  
8 Do you anticipate -- are you losing money and can you fund  
9 yourself from your operations, the answer was yes we are losing  
10 money and no we cannot fund ourselves from our operations. And  
11 that we need to go back to the market, in the short term, for  
12 capital.

13 But yes, there is no vote presently pending but the  
14 anticipation is that they need to go to the market in this  
15 short period of time. So what happens from that perspective is  
16 that, I think as everybody in this courtroom and as Your Honor  
17 is well aware from many years of being in private practices,  
18 that doesn't happen overnight and you may never be able to put  
19 a transaction together because of the fact that this is what's  
20 occurred with respect to these shares.

21 If you can lock up those shares and know that those  
22 shares can't vote and may be subject to -- and possibly not  
23 going out there, then that will make it somewhat easier, I  
24 think, was the conclusion to be drawn from Mr. El-Hillow's  
25 testimony. So I understand Your Honor's point but I think it's



1 a process, especially for a company like this. I think what he  
2 said was that the capital markets are extremely challenging,  
3 the debt markets are certainly extremely challenging. And as a  
4 result that will have a negative impact on how they raise  
5 money. And if this matter were to run its normal course and  
6 take six, nine months or a year to resolve, then by that point  
7 in time there might not even be a company left if there's an  
8 issue with respect to how they vote.

9 THE COURT: But when you say if this matter were to  
10 run its normal course, you're talking about the adversary  
11 proceeding brought by Evergreen against Barclays, correct?

12 MR. GRILLO: Barclays and Lehman, yes.

13 THE COURT: And your assumption is that that's a  
14 process that takes six months, nine months or a year to  
15 resolve?

16 MR. GRILLO: That's my working assumption Your Honor.  
17 Yes. Just going through the fact that there's time to answer,  
18 there could be pre-trial motion practice, discovery --

19 THE COURT: Does that mean that what you're looking  
20 for is an injunction that might have a duration of as long as a  
21 year?

22 MR. GRILLO: Well, I think what we are looking for  
23 today is an injunction for some period of time in the hope that  
24 one, we can negotiate a resolution. We'd certainly be willing  
25 to live with a short term injunction so that this way we know

1 that all of these parties have been occupied with very weighty  
2 and big matters.

3 We'd like an injunction for the opportunity to  
4 discuss a resolution with them. What we don't want to do is  
5 have the shares go out in the short period of time before we  
6 could actually negotiate a resolution because we think that --

7 THE COURT: See, I think you actually have a  
8 different case but I'm not suggesting that the case you've put  
9 on is inadequate; I'm just making an observation.

10 If you had a financing transaction that was within  
11 your grasp and you had a witness who said I went to try to  
12 close this transaction and I needed shareholder consents and I  
13 called up the people at Barclays and they hung up on me. Let's  
14 just say that happened.

15 MR. GRILLO: Sure.

16 THE COURT: That's a different kind of fact pattern  
17 as opposed to I have a litigation that might go on for a year,  
18 don't know how long it's going to take, actually. And sometime  
19 in that year we may have the need to go to the markets, in fact  
20 we expect we will and we don't know whether or not somebody at  
21 the other end of the phone is going to say yes when we ask for  
22 an affirmative vote. That's a pretty speculative suggestion as  
23 compared with one that I made up which involves imminent harm.  
24 So I'm just letting you know that one of the things I'm  
25 weighing as I'm hearing all this is the difference between that

1 which is imminent and real and that which is foreseeable but  
2 long term and not yet in anybody's grasp.

3 MR. GRILLO: Okay. Could I respond to that point, if  
4 I may?

5 THE COURT: Absolutely.

6 MR. GRILLO: Okay. Very simply, Your Honor, based on  
7 where we are and based on the events that occurred and based on  
8 the uncertainty with these shares, we may have difficulty just  
9 getting to that point, on account of the current circumstances  
10 and what has happened with the shares.

11 And so it would almost be, frankly, a rich man's  
12 problem, so to speak, if we were coming to the Court and saying  
13 well we had this transaction all lined up and ready to go.  
14 People will have very little interest, perhaps, in  
15 participating in any kind of a financing knowing what's  
16 happened and knowing that there is a party out there. No one  
17 will invest the time or the energy without understanding where  
18 the second largest shareholder of the company is.

19 THE COURT: Who's the largest?

20 MR. GRILLO: I think it's DC Chemical. Yes, Your  
21 Honor, it's DC Chemical. DC Chemical has, I think, twelve  
22 percent, approximately, seventeen million shares. They also  
23 have, Your Honor, a strategic relationship. They're a main  
24 supplier of the company and what was put together, and this is  
25 obviously all disclosed in our public filings, but they put

1 together a transaction where we sold them shares and they  
2 continued to supply us with silicon, I believe. So they're a  
3 major player in our company but they're also a strategic  
4 partner.

5 We had, as our partner if you will, Lehman as our  
6 banker and the duties that they had to exercise good faith  
7 under these variety of agreements that we discussed today. Now  
8 we don't have that. Now we've got a purchaser who obviously  
9 has taken, since the sale, little or no interest in our  
10 company. Now we have to go back to the markets and raise more  
11 money because we're at a cash flow negative business, because  
12 that takes some time to put together. And what we don't have  
13 in the record and not withstanding the fact that we've raised  
14 it in the pleadings is what they think they even paid for it.  
15 And that's where the disconnect, I think, is quite frankly. Is  
16 that if this were something where they said look we took a  
17 strategic interest in this for the following reasons, and I'm  
18 sure if they had somebody who could say that, they would have  
19 done that but there isn't. And that's why getting to the  
20 balance of the harms argument, that's why this is so much more  
21 critical for us, respectfully, then it is for Barclays or for  
22 Lehman.

23 And whereas it can be resolved as far as their  
24 concerned by taking the whole transaction and whatever the  
25 value was under the repo or otherwise that was paid for it and

1 putting it aside, the difference is it's extremely difficult  
2 for us to do that. It's extremely difficult to go into the  
3 marketplace with this issue open. It's extremely difficult to  
4 post a bond. I mean, we're not -- Your Honor made that point  
5 in the very beginning. We know what the law is on that point.  
6 What we had tried to propose something to Your Honor, was to be  
7 more creative so that this way we wouldn't suffer the harm  
8 that's been caused by this transaction when we did everything  
9 that we could to reach out and figure out what was going on.  
10 And that's really where this -- where this is so important to a  
11 company like Evergreen. And presumably, it was a forty-five  
12 billion dollar transaction. This is, at best, fifty or sixty  
13 million dollars of it. We're sensitive to that. But if you  
14 measure it on a percentage basis, it's miniscule.

15 THE COURT: Well, the forty-five billion, as I  
16 understand it, was the amount advanced by Barclays in  
17 consideration of the repurchase agreement. And my  
18 understanding is that the securities that were swept up in that  
19 repo included the stock which was subject to the share lending  
20 agreement that we've been talking about.

21 MR. GRILLO: We believe that's correct.

22 THE COURT: Now, one of the problems that I'm having  
23 as I'm listening to all this, and I'm going to give everybody  
24 who wants to argue an opportunity to speak, is that assuming I  
25 get over the hurdle of irreparable harm, which I consider to

1 be, as I said at the outset, a significant hurdle. And I've  
2 also said that I view some of what you talked about as  
3 sympathetic but speculative.

4 I think the bonding problem is a very real problem,  
5 in part because you're talking about tying up the shares for an  
6 indefinite period of time. You mentioned, well perhaps this is  
7 just a short term arrangement, I don't know that and I'm not  
8 sure what the proper bond would be for a short term injunction  
9 anyway. One of the problems we all confront in the current  
10 climate is that with volatility being what it is and with the  
11 share price having materially eroded over time this year, as I  
12 understand it, it's very hard to know whether holding these  
13 shares in the current environment exposes Barclays, as  
14 purchaser, to risk and how to quantify that risk.

15 If you had an agreement with Barclays concerning the  
16 terms of an appropriate bond, it would be much easier for me to  
17 get over the hurdle as to speculation. And if you had an  
18 agreement as to the duration of some kind of consensual  
19 standstill in connection with disposition of the shares, that  
20 would also be helpful. But my working premise is that we  
21 wouldn't have had this hearing if it were possible for counsel,  
22 by agreement, to work out some kind of standstill arrangement.  
23 And that in effect everybody's sort of testing the water here.

24 I'll hear what Barclays' counsel has to say on this  
25 whole subject but I'd be interested in knowing, assuming I were

1 to set a bond, what the right amount would be because I'm not  
2 inclined to go along with the creative approach that you  
3 outlined at the outset of the hearing. This is something  
4 which, if it is to be approved as a preliminary injunction,  
5 will require an appropriate bond. And I'm going to need some  
6 guidance from the parties as to what the amount of the bond  
7 should be.

8 MR. GRILLO: Understood. And I'd like to, if I just  
9 can take a moment. And I know the other parties will respond  
10 to this point as well.

11 With respect to the amount of the bond, our guys have  
12 tried to engage, I think, as Mr. El-Hillow testified, with  
13 Barclays and find a responsible party to discuss business  
14 terms. That did not occur. Why? Because in all likelihood  
15 this is just not on anybody's radar on the business side.  
16 That's my sense. So we're all prepared to have a variety of  
17 discussions, starting with a standstill and what the terms of  
18 the standstill would be.

19 We are prepared to reach out and do that and have  
20 that discussion. In terms of what an appropriate injunction  
21 would or wouldn't be, I think what we can do is we can bite  
22 this off, frankly, in small chunks. And based on where I think  
23 I understand Your Honor to be is to say to the Court look, tell  
24 us you're not selling the shares in the next, call it, fifteen  
25 days. That being the case, we can come back to Your Honor with

1 a recommendation for a bond amount, if there is one, or some  
2 other form. But it doesn't sound like, from a business  
3 perspective, and there's been no evidence offered and from what  
4 Mr. Morag said there's no intention -- just as we're concerned,  
5 they have not expressed an intention to sell. And if, in the  
6 interim, they make a decision to come back and sell sooner,  
7 then we can do that.

8 Our concern and our speculation, which we would have  
9 to ultimately undertake discovery on is we don't even know  
10 whether or not they knew that they were getting these, other  
11 than to say that they were thrown into a pile of shares along  
12 with everything else. Discovery will sort that out at the end  
13 of the day. But what we're talking about is addressing an  
14 immediate concern. We can do it over a short period of time,  
15 we can come back to Your Honor either with an agreement or not  
16 or I think a firm position on what the appropriate amount of a  
17 bond will be. But I don't see how people are harmed in the  
18 interim if we just ask everyone to stand still for a very  
19 limited period of time.

20 THE COURT: You didn't need me to make that request  
21 and get that answer. Presumably this all could have happened  
22 in a conference room last week instead of in a courtroom today.

23 MR. GRILLO: It could have but it didn't and that's -  
24 - and that's unfortunate. If this wasn't a matter of extreme  
25 importance to us we would not want to miss the opportunity to



1 be before Your Honor if it appeared that we couldn't work  
2 things out. And I don't want to characterize either what did  
3 or didn't happen leading up to the hearing because it's  
4 irrelevant.

5 THE COURT: It's not part of a closing argument. I  
6 understand your position and I understand your argument, which  
7 is maybe we can just push this over for a couple of weeks and  
8 parties can talk about the bond amount. But of course that  
9 assumes that there is a willingness on Barclays part to  
10 acknowledge that you've shown irreparable harm and that if push  
11 came to shove that they'd actually lose.

12 So I think I'd better hear their argument and make a  
13 judgment as to how strong it is before we go into the fifteen  
14 day rule.

15 MR. GRILLO: Okay. I did have a couple of quick  
16 points that I did just want to make but I can do that  
17 afterwards or not at all.

18 THE COURT: Why don't you finish your argument, that  
19 way Barclays can know exactly what it's responding to.

20 MR. GRILLO: All right.

21 THE COURT: Okay.

22 MR. GRILLO: Your Honor posed two questions at the  
23 beginning. One, are they taking under the SLA or are they  
24 taking pursuant to the 363 sale? I don't know that we heard or  
25 maybe the answer to that was presumed. In our view the 363

1 sale, at least as it relates to this stock, because of a lack  
2 of notice after the inquiry that was made to Lehman before the  
3 sale took place meant that at least as far as our rights were  
4 concerned that the 363 sale should be put to the back burner  
5 and we should look at what the rights were under the share  
6 lending agreement. It's our position that the share lending  
7 agreement controls in that regard.

8 With respect to --

9 THE COURT: How does it control, as a matter of law,  
10 if you accept for the sake of today's discussion, that there is  
11 a valid sale order that sold to Barclays, as good faith  
12 purchaser, a portfolio of assets including these shares?

13 MR. GRILLO: Because, Your Honor, the question is  
14 what did the debtors tell the parties were being sold and what  
15 was in fact sold. And it's our position that those are two  
16 different things. And to the extent that the debtors made  
17 certain representations or warranties, it's a premise of our  
18 action that they were inaccurate as it was for the shares on  
19 account of the existence in the share lending agreement. And  
20 as a result that since we did not have -- as we, sort of, went  
21 to assert our rights and they didn't provide us with direct  
22 notice of the sale, I think the case law says that in order to  
23 be bound by this type of order you had to have notice. They  
24 admitted, or excuse me, there's nothing in the record rather  
25 that says that they gave us notice notwithstanding the fact

1 that there is, in the record, letters to them with regard to  
2 the rights of our shares. So from our perspective we have due  
3 process problem based on the way Lehman conducted the sale.

4 So that's the issue as far as our client is  
5 concerned. We understand that there was a big transaction but  
6 it wasn't disclosed to us that these shares were being put as  
7 part of that group of assets that were subject to the repo. In  
8 fact, in the motion papers the repo is not disclosed. So  
9 that's the concern that we have vis-a-vis the sale order as it  
10 affects the Evergreen shares.

11 And again, just a final point Your Honor. With  
12 respect to the 13G that was filed and the fact that we haven't  
13 been able to follow up with Barclays, we just don't know what  
14 their intentions are. The fact that there's a 13G pending does  
15 not preclude them from filing a 13D that indicates they do have  
16 a greater interest in the company when they figure out what  
17 they have and what we don't have. Is that speculative? Yes it  
18 is to some degree. But there's nothing protecting the company  
19 if they were to change their view based on what they've  
20 purchased.

21 And as a result it seems to us that it's important  
22 to, sort of, establish that and use the injunction as a means  
23 to protect ourselves while we go through that process of  
24 figuring out who these shares belong to, do they really want  
25 them, is anyone willing to live up to this agreement or not and

1 what the position will be going forward. And if we have those  
2 conversations with Barclays, I think we would be in a position  
3 to move this matter forward and perhaps even take it off the  
4 Court's calendar. But we think, if you look at the harm, the  
5 harm is what it does to our process, what it does to our  
6 corporate governance, what it does to our fundraising. That's  
7 very different then anything they can say with respect to  
8 shares that they can't even come to court and explain what they  
9 paid for them at the end of the day as a good faith purchaser  
10 or otherwise. That tips, decidedly, in favor of Evergreen.

11 It's irreparable because there's a process. There's  
12 a process to raise money. It's very difficult, if testimony is  
13 uncontroverted, that it's much harder under the current  
14 circumstances as a result of this sale then it would be  
15 otherwise. Thank you.

16 THE COURT: Thank you, Mr. Grillo.

17 (Pause)

18 MR. MORAG: Your Honor, we do believe that Evergreen  
19 Solar has failed to establish, as is their burden, an imminent  
20 irreparable harm that is not, in fact, speculative or  
21 potentially far off in the distance. The record before you  
22 would be -- could just as equally support a finding that the  
23 Barclays ownership at this time is neutral to the company,  
24 beneficial to the company. There is absolutely no specificity  
25 or information on which you could rely to make a determination

1 that Evergreen is being adversely affected.

2 The other point is we're here on a motion that was  
3 noticed on the 21st that had a specific order that they wanted  
4 Your Honor to enter. And we have, entirely now, a moving  
5 target. The concerns that were raised today about votes and  
6 about the things that differ between Lehman, when Lehman had  
7 the shares they didn't vote, they didn't get dividends. Now  
8 Barclays has the shares. But those aren't even covered by this  
9 injunction that they're asking you to sign. This injunction is  
10 not to sell the shares or encumber them. It doesn't even  
11 address the issue of voting and governance.

12 Now, with respect to -- there is also no basis for a  
13 short injunction until something.

14 THE COURT: The parties can agree to that, that's the  
15 only basis for it.

16 MR. MORAG: That's right. So what we're here on  
17 today, what they've noticed and fully briefed and put on their  
18 case, and we have our case with respect to the documents we  
19 submitted and the declaration of Mr. Petri, is that there is  
20 simply no irreparable harm and no harm, certainly that is  
21 claimed to be irreparable, that would be remedied or alleviated  
22 by the injunction that they're actually seeking.

23 The other thing that even doesn't make sense is they  
24 don't want us to sell the shares because of the large  
25 controlled position. But if we actually did sell the shares in

1 small increments that doesn't depress or adversely affect the  
2 stock price, then there would be no corporate governance issue.  
3 So I don't really understand that their entitled to anything  
4 right now, certainly on the basis of what they've showed but I  
5 should say, I know you're focusing on irreparable harm. As the  
6 case law indicates it is the paramount concern. But there are  
7 some substantial issues with respect to the likelihood of  
8 success on the merits here.

9 Mr. Grillo anticipated that with discovery and  
10 answers and pre-trial motions this case could take a year. Our  
11 position is that this case will be the subject of a motion to  
12 dismiss, irrespective of -- not irrespective, Your Honor, you  
13 could obviously make findings that would influence our  
14 decision. But our coming into this case assumption, into this  
15 hearing assumption, is that the fundamental premise of this  
16 concept that they had title is erroneous and I will walk you  
17 through that if you'd care to hear it.

18 This concept that LBI, Lehman Brothers Inc. the party  
19 that sold these shares to Barclays in the repo, did not have  
20 title at the time of this transaction because LBIE was in  
21 default -- the borrower is in default, is not accurate on this  
22 agreement that they're so heavily relying on. And to summarize  
23 it for you, their own 8K, the document that was reviewed by the  
24 lawyers, indicates that when LBIE borrowed the shares it  
25 immediately transferred all thirty million to LBI. The

1 obligation is on the borrower, not LBI, to return these shares.

2 The act that they claim cut off the title or interest  
3 of LBIE, the borrower, occurred on September 15th if you accept  
4 their papers. The transfer of those shares, when LBIE had  
5 every right to do so to LBI, took place in July or the end of  
6 June. So that is the reading, the proper reading, of this  
7 agreement and I have a demonstrative, it's just a series of  
8 bullet points that articulates the syllogism of this argument,  
9 if Your Honor is interested in receiving it.

10 THE COURT: I'm interested but it's certainly  
11 unconventional.

12 MR. MORAG: Okay.

13 THE COURT: If you've gone to the trouble of  
14 preparing it I'll take a look at it.

15 MR. MORAG: It's no different from if I read it to  
16 you, you'd hear it in argument form.

17 THE COURT: I'll take the demonstrative.

18 MR. GRILLO: I assume this is being offered as  
19 argument and not as evidence.

20 THE COURT: It's clearly not evidence.

21 MR. MORAG: It's not evidence, it does cite evidence.

22 THE COURT: You may approach with it and I'll follow  
23 along as you make the argument.

24 I'll only point this out before you go into this.

25 This was not a mini hearing on whether or not a good claim was

1 made by the plaintiff, Evergreen Solar, with respect to the  
2 questions of title that you're now addressing. No witness was  
3 presented in connection with that. I'm not sure what witness  
4 could be presented but if we get to a trial, should I deny your  
5 motion to dismiss, I suppose we'll find out what witness will  
6 get to that question, unless it's something that can be  
7 disposed of on the basis of a clean reading of unambiguous  
8 documents.

9 But I'm questioning where you're going with this  
10 because, and I'm not trying to cut you off, I'm interested in  
11 hearing your argument. Obviously you're getting the question  
12 of whether or not there's a likelihood of success on the  
13 merits. But I'm surprised we didn't get to that before  
14 closing. Because wasn't that part of the case you'd be putting  
15 on in defending against this or is this that case? Do you view  
16 this as legal argument or do you view this as my needing to  
17 review record facts to make judgments in which I assess the  
18 relative strengths of your defenses.

19 MR. MORAG: Your Honor, forgive me but I had  
20 understood that the fourteen exhibits were admitted into  
21 evidence.

22 THE COURT: They were but nobody told me what they  
23 were. So the only thing that I know is what Mr. Grillo  
24 presented during his examination of the witnesses. And because  
25 you did not, during the course of the case up to this moment,



1 reference any of the documents, I can't really tell where  
2 you're going with it.

3 I'm going to give you the full opportunity to make  
4 the presentation. And if you want to take me through what's in  
5 the agreed record, that's fine.

6 MR. MORAG: Your Honor, the agreed record are the  
7 documents that were annexed to the complaint, that were annexed  
8 to our opposition papers. And that's the sum total of it.  
9 Maybe I misunderstood but when we had our conference call  
10 yesterday, I had understood that Your Honor had read the  
11 papers.

12 THE COURT: Yes.

13 MR. MORAG: And what I am suggesting to develop here  
14 is an argument, a legal argument, based on the evidence that's  
15 on the record with which I thought Your Honor was familiar.  
16 And forgive me if I made that erroneous assumption.

17 THE COURT: No, it's fine. I don't view anything  
18 that I read in pleadings as being in the record. I simply view  
19 that as being an attachment to a pleading. If you're telling  
20 me it's now all in evidence, that's fine. We'll talk about it  
21 now.

22 MR. MORAG: I believe it is and I thought it might be  
23 inappropriate to argue with the witness about the meaning of  
24 agreements.

25 THE COURT: We've talked about this enough, why don't

1 you go through your argument.

2 MR. MORAG: And let me say, that obviously although  
3 irreparable harm is a threshold and key issue, for what they  
4 are seeking or what they say they're seeking the Court under  
5 the Second Circuit precedent must find the likelihood of  
6 success as well or the alternative aspect of the standards, the  
7 fair grounds for dispute run the balance of hardships. It's  
8 not just irreparable harm.

9 The point, and I think we do lay it out in our  
10 opposition brief so I don't know that I need to belabor it, is  
11 simply that their whole case, and I think Mr. Wiltenburg  
12 mentioned this as well, turns on the assertion that whereas  
13 Lehman, what they refer to as Lehman, they refer to the Lehman  
14 defendants throughout their reply, they don't distinguish them.

15 THE COURT: They argue this in ipso facto effect  
16 caused by the downgrade in credit quality. The result being  
17 that they are revested with title to the shares. That's their  
18 argument.

19 You argue that that's not so.

20 MR. MORAG: Well actually, if I may. The downgrade  
21 did not constitute an event of default that they claim revested  
22 them with the shares. The downgrade created a collateral  
23 trigger. As Mr. El-Hillow testified, this deal, the deal they  
24 negotiated did not include any collateral whatsoever from  
25 Lehman Brothers holding these shares worth hundreds of millions

1 of dollars, until there was a two notch credit downgrade in the  
2 parent holding company. That was the deal. The credit risk  
3 existed until the two notch downgrade.

4 It happened to coincide, I guess calendar-wise, with  
5 the filing. The LBHI downgrade coincided, maybe coincidentally  
6 maybe not, I don't really know that, with the filing in London  
7 of LBIE in its insolvency proceeding. So that was what is  
8 claimed to be the event of default. And that is what triggers  
9 the obligation three days thereafter to return the shares and  
10 what they say triggers the divestment of title at that point.  
11 When there is a duty to deliver them back there's no longer  
12 title.

13 In LBIE the borrower, we say that these distinctions  
14 between the Lehman entities are legally significant. I  
15 understand if Mr. El-Hillow as a business person did not  
16 appreciate them. But these are sophisticated documents,  
17 reviewed by lawyers. There may have been good and proper  
18 reasons for Lehman Brothers, as a business organization, to  
19 have structured these things this way with a European borrower  
20 and U.S. broker/dealer. But I think it's pretty clear from  
21 these entire proceedings we can't just ignore all that and just  
22 mush it all together.

23 Lehman Brothers International, Inc., Europe, is the  
24 borrower. Its title is supposedly divested only on the 15th.  
25 Before that time Lehman Brothers International Europe had

1 transferred the shares. The word is sold according to their  
2 8K, which is their publication to the shareholder community.  
3 They sold the shares to LBI. There was legal significance to  
4 that act. The significance is that when Barclays purchased  
5 them through the repo from LBI, LBI had obtained them before  
6 any termination of anybody's rights. That's the point that  
7 this --

8 MR. GRILLO: Your Honor, respectfully that's not in  
9 the record.

10 THE COURT: Well, you don't have to make that  
11 argument. He's making a closing argument and I've already said  
12 that I don't view it as being in the record. It's not in the  
13 record. You're making an argument that's much the same as the  
14 argument being made by Evergreen Solar. They're saying the  
15 documents should be interpreted our way and you're saying, as a  
16 matter of fact, that the securities moved on certain dates and  
17 were, in fact, located at LBI on certain dates. I don't know  
18 that. Tell me where, in your papers, you make that clear so  
19 that it's in the evidentiary record.

20 MR. MORAG: Yes, Your Honor. In the evidentiary  
21 record of Tab 7, the 8K at page 14. This was the sentence that  
22 Mr. El-Hillow read that establishes that as of July 2nd, when  
23 this document is dated and put out into the public, the  
24 transaction was to be a borrowing by LBIE of the 30,856,538  
25 shares. Delivery to the borrower and the borrower -- and the

1 underwriter, which is LBI, that was the reason for going  
2 through the different entities. Upon such issuance and loan  
3 to the borrower agrees to purchase such shares from the  
4 borrower.

5 THE COURT: How do I know that happened?

6 MR. MORAG: Your Honor, we know that LBI was the  
7 one -- the entity that sold them to Barclays in the repo.

8 THE COURT: How do I know that the 8K -- all the 8K  
9 is doing is attaching the underwriting agreement which is dated  
10 June 26, 2008, Exhibit 1.2. We spent some time trying to find  
11 page 14 because there were multiple page 14s in the exhibit.  
12 And you went through that sentence with this witness who was  
13 certainly not a witness who speaks for Lehman Brothers, the  
14 borrower, the lending agent or any affiliate of Lehman  
15 Brothers. He speaks for the company. And you asked him  
16 questions about a document that he acknowledged, based upon  
17 your questioning, was prepared by lawyers, accountants and  
18 others, although he was involved in it. That doesn't tell me  
19 when the securities moved, if the securities moved or whether  
20 or not they were held by the borrower, contrary to the terms of  
21 the agreement and moved to another time. You haven't proven  
22 it, at least not to my satisfaction.

23 You certainly established what the underwriting  
24 agreement provided. That doesn't mean it was performed in  
25 accordance with its terms.

1 MR. MORAG: Your Honor, I believe we will be able to  
2 find further citations in this record. But let me just say  
3 that we --

4 THE COURT: All I'm saying is you're making an  
5 argument, and I understand the reason you're making it, but you  
6 haven't proven what you assert has been proven by virtue of  
7 that paragraph.

8 MR. MORAG: Well, there is -- I will try my best to  
9 fill in those gaps as you see them.

10 THE COURT: You may not be able to do it this  
11 evening.

12 MR. MORAG: I may not.

13 THE COURT: Because the record is closed. I mean, if  
14 it's in this document and it says if there's some kind of  
15 receipt executed by LBI showing receipt of shares and it's  
16 stamped and it has a seal on it, I guess that's pretty  
17 persuasive or some other transactional document from within  
18 Lehman Brothers showing movement of shares.

19 But I think we all know, based upon everything that's  
20 going on in this case, that the records are still in the  
21 process of being restored and made transparent.

22 MR. MORAG: Your Honor, we will endeavor to find it  
23 and if we don't we will move on. But the last element of the  
24 chain that whether or not the repo or the shares were sold by  
25 LBI, I believe, is alleged by the plaintiffs to have been the

1 case in their reply papers. The Petri declaration does  
2 establish that the repo was between LBI and Barclays. There  
3 was no involvement of LBIE in the repo.

4 I have to fill in the gap but the first part and the  
5 third part are there. I'm working on the second.

6 THE COURT: We have absolutely no debate here. We  
7 understand that somehow these shares ended up at Barclays. And  
8 based upon the transactional provenance, the shares must have  
9 been in the hands of LBI at some point. I just don't know at  
10 what point they ended up in LBI's control.

11 MR. MORAG: Your Honor, that's --

12 THE COURT: Nor is there any statement by anyone as  
13 to when that took place, to my knowledge.

14 MR. MORAG: Your Honor, I hear you but at the same  
15 time I would simply point out that although we have every  
16 reason to believe and we will endeavor to confirm, that it  
17 happened in the course -- that it was outlined -- it was  
18 expected to happen. We are here on a motion as to which  
19 Evergreen bears the burden. For them to succeed in their  
20 argument that they timely vested title and the consequence of  
21 that is that nothing done after the 15th of September, with  
22 respect to these shares, by any Lehman entity was appropriate  
23 or gives the ground for a conversion claim. Since it is  
24 admitted and known that LBI held the shares, I think the  
25 failure of proof there goes to the question of Evergreen's

1 establishing its likelihood of success on what is a key element  
2 of their claim, this title divested.

3 Now, if I can move on. We do agree that the Court  
4 can't simply put the sale order to one side. And all we would  
5 say is that they didn't, as far as I can tell, brief the case  
6 law on due process notice. But I don't believe they  
7 established a likelihood of success that the sale order should  
8 be ignored, revised or any other verb for purposes of their  
9 claim. And I think it's a binding, governing document that  
10 Your Honor should take into consideration, including the  
11 findings made therein.

12 Finally, there's the UCC argument. And that is that  
13 comes into play only if you find that they did have some sort  
14 of property interest in these shares, that there was some sort  
15 of title reversion that gives them a claim, potentially, to  
16 look to third parties who purchased these shares.

17 Now, in terms of -- that's not an issue that's been  
18 discussed at any length here in their papers. They seem to  
19 suggest that they should be considered like -- akin to a  
20 customer of Lehman Brothers Inc, I guess. We would point out,  
21 and we made reference in our opposition to the law that says  
22 that if you're claiming to be a customer and that your  
23 securities intermediary has been rendered insolvent, that falls  
24 under the rubric of Section 8503 of the UCC, which imposes a  
25 standard that's different from the notice of an adverse claim.



1 It actually is, I think, intentionally and for various policy  
2 reasons an even higher standard for the plaintiff to meet which  
3 is that there was collusion between the purchaser and the  
4 securities intermediary to violate the security intermediary,  
5 that would be Lehman's, obligations to Evergreen.

6 Now, they've not made any showing of that in the  
7 record portion. And so that's the law if they want to claim  
8 that they're customers in this circumstance. If they are  
9 counterparties, the Sections 8502 and 8510 of the UCC say that  
10 no claim, whether it's conversion or any other legal theory,  
11 can be asserted against a third party purchaser unless there is  
12 notice of an adverse claim.

13 The adverse claim concept is not simply that there  
14 may be people out there who aren't going to be happy with this  
15 transaction. But rather it's a -- there has to be notice that  
16 there is someone out there with a property interest in these  
17 shares, not a mere contractual right to the shares, a property  
18 interest in the shares. And that's found in the definition of  
19 adverse claim in 8102(1). And there are three circumstances  
20 that the UCC, in Section 8105(a) enumerates as giving notice of  
21 an adverse claim. And these are narrowly construed and  
22 exclusive. The first is that the person knows of the adverse  
23 claim. That's a clear, actual knowledge standard that they  
24 don't purport to satisfy, they're not relying on that one.

25 The third ground, which they're also not purporting

1 to rely on, is that there is some extraneous, statutory,  
2 regulatory duty to investigate the provenance pedigree of a  
3 security that you're purchasing. There isn't and they don't  
4 rely on that one.

5 So that leaves subsection (2). The person is aware  
6 of facts sufficient to indicate that there is a significant  
7 probability that the adverse claim exists and deliberately  
8 avoids information that would establish the existence of the  
9 adverse claim. That's what they call the willful blindness  
10 standard but it starts from the proposition that there is some  
11 facts that indicate a significant probability of an adverse  
12 claim.

13 What they say in their papers is that we should have  
14 known that Lehman had lots of share lending agreements. That  
15 is not, and there's been no evidence, that the circumstances of  
16 the repo transaction and the interactions between Lehman and  
17 Barclays Capital provided any information of notice. It has to  
18 be the specific claim not share lending agreements in general.  
19 It has to be information about Evergreen Solar. And other  
20 commentary to this section also provides that it is -- when  
21 we're talking about an organization it's not what the entire  
22 organization knows it's what the people involved in the  
23 transaction knew. And you have Mr. Petri's declaration that  
24 Barclays was not aware of any claim by Evergreen to these  
25 shares until well after the repo transaction occurred.

1 That is the record. That's what's in numbers 1  
2 through 14. So with those three arguments, the lack of the  
3 title argument, that we have our little hole on, the sale order  
4 and the UCC, we say there's no likelihood of success on the  
5 merits.

6 As to the bond, and again we agree with Your Honor's  
7 comment that you don't get an injunction because you're willing  
8 to post a bond, you have to establish your entitlement to an  
9 injunction and then there is a separate requirement of a bond.  
10 The bond has to protect us for the duration of the injunction.  
11 The injunction they're asking for, what they put before you, is  
12 indefinite. And the consequences to Barclays are the loss of  
13 the market value of these shares between now -- I guess between  
14 now and when this case is resolved if an injunction were to go  
15 out till the case is resolved. And based on the testament of a  
16 year, that would be the -- the bond would essentially have to  
17 cover that risk of the valuation of the shares in the next  
18 year.

19 I see that I may not have been able to fill the  
20 little hole by the time I'm done so if it matters, for future  
21 proceedings, we will endeavor to fill that hole. If it doesn't  
22 affect your decision tonight, then it may not be necessary in  
23 the future.

24 THE COURT: Okay. Mr. Wiltenburg, do you wish to be  
25 heard?

1 MR. WILTENBURG: If I may.

2 THE COURT: Sure.

3 (Pause)

4 MR. WILTENBURG: Your Honor, I feel that this matter  
5 is really much simpler then it might appear to be. And I would  
6 start with Exhibit 2 in evidence, which is the SOA and with the  
7 section that this -- from which plaintiff tries to derive this  
8 automatic divestiture concept.

9 There was reference in the testimony to the second  
10 sentence of Section 7 which appears on page 10 of the exhibit.  
11 But the real guts of it is the first sentence. And at the time  
12 that the bankruptcy filing occurred there was no -- even if you  
13 suppose that something as abstract as divestiture of title or  
14 something as unusual as divestiture of title happens upon the  
15 mere obligation to make redelivery, okay, that obligation had  
16 not come into existence when the bankruptcy wall came down.

17 The idea that a pre-petition private contract can  
18 have the effect of divesting a bankrupt estate of property is  
19 an idea that, seems to me, fundamentally at odds with what we  
20 know.

21 THE COURT: But we had this discussion when you made  
22 similar comments at the outset. The borrower here is Lehman  
23 Brothers International, Europe, LBIE.

24 MR. WILTENBURG: Yes.

25 THE COURT: The sentence that you refer me to in

1 Section 7 deals with the borrower.

2 MR. WILTENBURG: Correct.

3 THE COURT: Which is the entity which is not before  
4 me but rather in administration in the UK.

5 MR. WILTENBURG: Yes.

6 THE COURT: And the entity that you don't represent.

7 MR. WILTENBURG: Quite so.

8 THE COURT: And in your earlier remarks you talked  
9 about their being some concept, you used the term ring fence,  
10 like a ring fence that --

11 MR. WILTENBURG: Yes. Yes.

12 THE COURT: -- that comes down around the UK estate  
13 to prevent the loss of property rights. That's not exactly  
14 something that I can --

15 MR. WILTENBURG: Your Honor --

16 THE COURT: -- pin my decision on, is it?

17 MR. WILTENBURG: Well --

18 THE COURT: It's pretty oblique.

19 MR. WILTENBURG: If I can push that comment --

20 THE COURT: If you're saying to me that something  
21 akin to the concept of property of the estate and the ipso  
22 facto clause applies as to contractual rights as to all  
23 contracts that affect LBIE and that the UK administrator who  
24 chose to watch but not participate, took the position in the  
25 case that there was no loss of rights by virtue of the

1 commencement of the UK administration proceeding on September  
2 15, that would certainly be something I could hang my hat on.  
3 Your argument is not, however, unless you're able to connect  
4 the dots for me.

5 MR. WILTENBURG: Your Honor, if I may. I think I  
6 don't need to know what the law is that prevails in London to  
7 make this argument. What I'm saying is that the plaintiff  
8 needs to assume, as the first premise -- if you don't go this  
9 step you don't go to any of the subsequent steps, has to assume  
10 as a first premise a highly improbable thing for which they've  
11 offered no support of any kind.

12 It would cost the estate money for me to find out and  
13 get expert testimony on what the law is that prevails in  
14 London. I just don't think it's very likely.

15 THE COURT: It doesn't cost very much to pick up the  
16 phone and call Linklaters and ask them hey, you know I've got  
17 this hearing this afternoon, can you tell me whether or not the  
18 UK insolvency law has something like an ipso facto law. We  
19 have one, do you have one too? I think the answer would be  
20 either a yes or a no. It wouldn't be expensive.

21 MR. WILTENBURG: But I think the burden of proving  
22 likelihood of that proposition, likelihood of the proposition  
23 that there could be automatic divestiture, based on a private  
24 pre-petition contract, the likelihood of that proposition is  
25 for the plaintiff to show.

1 THE COURT: Well, they've made that allegation but  
2 nobody has convincingly said that they're wrong. You're just  
3 saying you think they're wrong.

4 MR. WILTENBURG: Okay. Well, I can start from the  
5 text of this provision which doesn't say that. And it only  
6 says, and they try to derive it from the proposition that the  
7 right to sell goes away when there's an obligation to redeliver  
8 the shares. I think we all have to agree that that obligation  
9 to redeliver the shares did not come into being until the  
10 bankruptcies had already happened.

11 THE COURT: Okay.

12 MR. WILTENBURG: Thank you, Your Honor.

13 THE COURT: I know you tried to make it simple and I  
14 appreciate your trying to do that. Ms. Harvey, do you have  
15 anything to say?

16 MS. HARVEY: Nothing, Your Honor. Thank you.

17 THE COURT: Okay. Well, it's just about 7:00, just  
18 as we predicted. I'm going to take about five minutes just to  
19 collect my thoughts and then I'll come back and provide my  
20 comments on the record. Don't go very far. Take a five minute  
21 adjournment.

22 (Recess from 6:58 till 7:08)

23 THE COURT: Please be seated. This is my ruling with  
24 respect to the motion brought by plaintiff, Evergreen Solar,  
25 Inc., for a preliminary injunction. We had a hearing that

1 included both the examination and cross examination of the  
2 chief financial officer of the plaintiff as well as the  
3 offering into evidence of a number of documents. Those  
4 documents are in the record as a result of a stipulation  
5 between counsel.

6 The standard for granting a preliminary injunction  
7 under applicable Second Circuit law has been briefed both by  
8 the plaintiff and principally by Barclays in opposition. There  
9 is no disagreement as to the applicable law here. It's  
10 standard. And to a very large extent the decision whether to  
11 grant a preliminary injunction is discretionary with the Court  
12 provided that the standards are satisfied. As noted during  
13 argument, the single most important prerequisite for the  
14 issuance of a preliminary injunction is demonstrating provable,  
15 irreparable harm.

16 The case law also indicates that irreparable harm is  
17 an injury that is not remote or speculative but is actual and  
18 imminent and a harm for which a monetary award cannot provide  
19 adequate compensation. I noted at the outset of the proceeding  
20 that that was the standard I was most interested in. And I  
21 hope that in making that comment I didn't distract the  
22 attention of the parties from other aspects of the standards  
23 that the Court needs to address, including likelihood of  
24 success on the merits. Counsel for Barclays spent considerable  
25 time, during the closing argument, pointing out a variety of



1 reasons why in, at least the judgment of counsel, the  
2 litigation brought by Evergreen Solar against Barclays PLC,  
3 Barclays Capital, Inc., Lehman Brothers Holding, Inc. and  
4 Lehman Brothers, Inc. is one that is subject to a motion to  
5 dismiss and is one as to which relief cannot be properly  
6 granted.

7 I'm going to start with the standard of likelihood of  
8 success on the merits for whether or not there are fair grounds  
9 for litigation with a balance of the harm favoring a party  
10 seeking injunctive relief.

11 It's a real burden to the Court to have to decide  
12 whether or not a case has been filed in good faith, is likely  
13 to produce a result favorable to the plaintiff on the basis of  
14 a hearing as accelerated as the one that took place today.  
15 This is not unconventional however, this is what happens in  
16 motion practice when a preliminary injunction, or in more  
17 extreme cases a TRO, is being sought. The purpose of the  
18 preliminary injunction is to preserve the status quo and to  
19 prevent irreparable harm.

20 I happen to believe that it is generally a good idea  
21 for the Court to be quite liberal in its interpretation of the  
22 likelihood of success or whether or not there are fair grounds  
23 for litigations standard. Because to find otherwise is to  
24 potentially deprive a deserving litigant of a remedy on a very  
25 spare showing.

1           Nonetheless, I do think that counsel for Barclays,  
2           during closing argument, demonstrated a number of areas of  
3           potential concern for the plaintiff here. And that this is a  
4           complaint which probably can be characterized as a long shot.  
5           One, that's a long shot because of the fact pattern involving  
6           the shares moving from the borrower to LBI and from LBI to  
7           Barclays pursuant to a sale order. And also one that's a long  
8           shot in light of the Article 8 UCC arguments that were made.

9           But notwithstanding the fact that these are possibly  
10          strong defenses for Barclays, I'm not going to rely on this  
11          prong of the standard for purposes of making a determination  
12          regarding the preliminary injunction. I think that there may  
13          well be solid ground for a Barclays' motion to dismiss,  
14          properly supported but that's not before me yet.

15          As I said at the outset, my focus is whether or not  
16          there is a showing here of probably irreparable harm. And as  
17          to that prong of the standard for granting a preliminary  
18          injunction, I remain unconvinced. I'm unconvinced in part  
19          because the problems with obtaining financing in today's credit  
20          markets are manifest and do not need to be repeated here.  
21          Companies like Evergreen Solar and much larger companies are  
22          having well publicized challenges in confronting their  
23          financing needs.

24          It is difficult for me to identify the parking of  
25          these particular shares at Barclays as a principle impediment

1 to the successful identification and closing of alternatives  
2 means to finance the company's operations and plans to expand.  
3 It's also true that if Evergreen Solar had deep pockets there  
4 would be a relatively simple economic solution to this problem.  
5 The shares would be repurchased with all rights being reserved.  
6 There would be an ability to go to the credit markets with  
7 perhaps a better balance sheet.

8 In effect, Evergreen Solar is one of what I assume to  
9 be a whole host of individual and corporate casualties of the  
10 failure of Lehman Brothers and of the general shutdown of the  
11 credit markets that has resulted in the heroic efforts by  
12 central banks worldwide to come up with appropriate bailouts.

13 In part, it is this context of trouble in the credit  
14 markets which makes it even more difficult for Evergreen Solar,  
15 as plaintiff, to demonstrate the shares in question now held by  
16 Barclays as disclosed in Barclays' 13G filing, represent a  
17 material impediment to future financing.

18 It's also true that this is a situation in which  
19 money damages probably do represent the proper measure of  
20 damages. Because to the very same extent that Barclays would  
21 assert that it is entitled to a bond, assuming that I were to  
22 grant the relief being sought in an amount which is measured by  
23 the market value of the securities, it is in fact the market  
24 value of the securities that represents the ultimate damage to  
25 Evergreen Solar.

1           If there were an angel who could step in to a  
2     boardroom with a blank check, the number that would be filled  
3     in would be today's closing price for the shares held by  
4     Barclays and Barclays, I assume, would sell those shares, at  
5     market, to Evergreen Solar. That's what we're talking about.  
6     The way to solve the problem, if you had the money, would be to  
7     buy back the shares.

8           In effect, this is an irreparable harm problem that  
9     is capable of solution with dollars. And it's also an  
10    irreparable harm problem that is, to the extent it's not solved  
11    with dollars, not yet manifest. Questions were raised during  
12    the hearing today as to adverse impacts on corporate governance  
13    and voting. Both of those issues I view as potentially serious  
14    issues if in fact it could be demonstrated that there were  
15    current problems in both areas.

16          The testimony is consistent with the observation that  
17    such problems might arise in the future but that no such  
18    problems have arisen today. Additionally, in questioning the  
19    chief financial officer at Evergreen Solar has stated that he  
20    did not know whether or not if he asked Barclays to consent to  
21    something, whether they'd say yes or no. His problem is that  
22    he doesn't know who to contact at Barclays.

23          I suspect, however, that Barclays has an internal  
24    phone directory, has e-mail and that with some diligence it's  
25    possible to get to someone with both apparent and actual

1 authority to deal with these shares. If as in when the issue  
2 ever arises and becomes a problem that requires attention.

3 Counsel for Barclays also noted and I think this is a  
4 fairly telling point, that the form of relief sought by  
5 Evergreen Solar in its proposed order granting a preliminary  
6 injunction did not really extend to these voting and governance  
7 issues but rather dealt with some lockup on the further  
8 disposition of the shares. It's a remedy that doesn't solve  
9 the problem.

10 I think that Mr. Grillo effectively presented his  
11 case but also, reading between the lines, made clear that this  
12 litigation is a cry for help. I think that Evergreen Solar is  
13 in need of an ongoing conversation with business people at  
14 Barclays, assuming they're willing to have that conversation,  
15 to try to come up with ways to improve Evergreen Solar's  
16 current condition. No one's under any obligation to do that  
17 but I suspect that if conversations along those lines took  
18 place, that that might go a long way toward resolving this  
19 litigation.

20 Under the circumstances and for the reasons stated, I  
21 deny the motion of Evergreen Solar Incorporated for a  
22 preliminary injunction. And I close the record. I suggest  
23 that counsel for those parties who have opposed the relief  
24 sought by the plaintiff submit a form of order providing for  
25 the denial of the requested relief consistent with the

1 statements made on this record. And if there's nothing more,  
2 we're adjourned.

3 MR. GRILLO: Your Honor, is that order just on  
4 submission or is it on notice?

5 THE COURT: It's going to be on submission. It's  
6 going to be very simple. It's going to be the motion is denied  
7 for the reasons stated on the record.

8 MR. GRILLO: As long as that what's it is.

9 THE COURT: That's all it's going to be. And we're  
10 adjourned. Good evening.

11 (Whereupon these proceedings were concluded at 7:26 p.m.)  
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I N D E X

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C E R T I F I C A T I O N

I, Lisa Bar-Leib, certify that the foregoing transcript is a  
true and accurate record of the proceedings.

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LISA BAR-LEIB

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Date: November 8, 2008